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Sub-Commission on the Promotion
and Protection of Human Rights
Fifty-third session
Item 5 of the provisional agenda

PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

Note by the secretariat

1. In its resolution 2000/15 of 17 August 2000, the Sub-Commission on the Promotion and Protection of Human Rights recommended that the Coordinator of the International Decade of the World's Indigenous People hold a special fund-raising meeting with the permanent missions in Geneva of interested States and the members of the Advisory Group for the Voluntary Fund for the Decade to encourage financial contributions to the United Nations Voluntary Fund for Indigenous Populations, as well as the appointment of qualified staff, including indigenous persons, from within the regular budget of the United Nations, to assist with the work of the Office of the High Commissioner for Human Rights relating to the indigenous programme, and submit to the Sub-Commission at its fifty-third session a report on the results of the initiatives taken to those effects.

2. The attention of the Sub-Commission is drawn to documents E/CN.4/Sub.2/AC.4/2001/4 and E/CN.4/Sub.2/AC.4/2001/5 which contain relevant information in that regard.

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PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

Note by the secretariat

1. In its resolution 2000/15 of 17 August 2001, the Sub-Commission on the Promotion and Protection of Human Rights recommended that the United Nations High Commissioner for Human Rights take the necessary action in order to promote the establishment, within the Office of Legal Affairs of the Secretariat, of a database on national legislation on matters of relevance to indigenous peoples, as well as a compilation of treaties and agreements between States and indigenous peoples.

2. In a memorandum dated 27 September 2000, the Office of the High Commissioner for Human Rights transmitted a copy of the resolution to the Office of Legal Affairs, requesting its advice. The reply of the Office of Legal Affairs, dated 11 October 2000, follows:

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"This is with reference to your facsimile of 27 September 2000 concerning the recommendations of the Sub-Commission on the Promotion and Protection of Human Rights. In particular, you refer to operative paragraph 14 of Sub-Commission resolution 2000/15 of 17 August 2000 in which the Commission recommends, inter alia, that 'the High Commissioner take the necessary action in order to promote the establishment, within the Office of Legal Affairs of the Secretariat, of a database on national legislation on matters of relevance to indigenous peoples, as well as a compilation of treaties and agreements between States and indigenous peoples'.

It would not be for the Sub-Commission on the Promotion and Protection of Human Rights to establish new functions or mandates for the Office of Legal Affairs or any other Secretariat unit in the absence of a decision by the parent intergovernmental organ, in this case the Economic and Social Council, as well as the consideration and approval of the financial implications of such a decision by the General Assembly. The establishment of the database of the kind described in the Sub-Commission's resolution would entail considerable financial implications and human resource requirements."

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PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

The rights of non-citizens

Preliminary report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103

GE.01-14137 (E) 200701

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I. INTRODUCTION

1. In March 1997, at its fiftieth session, the Committee on the Elimination of Racial Discrimination (CERD) discussed and decided to propose to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) nine topics for the preparation of studies, including the "rights of non-citizens" which had been suggested by Mr. Theo van Boven.[1] Mr. Michael Banton, Chairman of the CERD, in a letter dated 19 March 1997,[2] communicated these proposals to the Chairman of the Sub-Commission and requested that he present these proposals to the Sub-Commission at its forty-ninth session.

2. On 21 August 1997, at its forty-ninth session, the Sub-Commission, in resolution 1997/5, expressed its gratitude to CERD for recommending future Sub-Commission studies that could usefully contribute to the work of the Committee. Furthermore, the Sub-Commission, in its decision 1997/112 of 27 August 1997, decided to devote special attention to subjects proposed by United Nations treaty-monitoring bodies when choosing new subjects for study.

3. Accordingly, on 20 August 1998, at its fiftieth session, the Sub-Commission, in resolution 1998/103, decided "to entrust Mr. David Weissbrodt with the preparation, without financial implications, of a working paper on the rights of persons who are not citizens of the country in which they live, ... in order to enable it to take a decision at its fifty-first session on the feasibility of a study on that subject".

4. Mr. Weissbrodt presented his working paper, entitled "The rights of non-citizens",[3] at the fifty-first session of the Sub-Commission. The Sub-Commission then decided, in its resolution 1999/7 of 25 August 1999, to recommend that the Economic and Social Council authorize the Sub-Commission to appoint a Special Rapporteur to focus on the rights of non-citizens. It was also decided that the Special Rapporteur's mandate was to consist primarily of reporting on the status of non-citizens, but also to take into account the different categories of citizens regarding different categories of rights in countries of different levels of development with different rationales to be offered for such distinctions.

5. On 25 April 2000, the Commission on Human Rights, in its decision 2000/104, requested the Economic and Social Council to authorize the Sub-Commission to appoint one of its members as Special Rapporteur with the task of preparing a comprehensive study of the rights of non-citizens, based on the working paper prepared by Mr. David Weissbrodt as well as the comments made and the discussions that took place at the fifty-first session of the Sub-Commission and might take place at the fifty-sixth session of the Commission, and of submitting a preliminary report to the Sub-Commission at its fifty-third session in 2001, a progress report at its fifty-fourth session in 2002 and a final report at its fifty-fifth session in 2003. The Council approved this request in its decision 2000/283 of 28 July 2000.

6. On 1 August 2000 the Sub-Commission, in its decision 2000/103, decided to appoint Mr. David Weissbrodt as Special Rapporteur with the task of preparing a comprehensive study of the rights of non-citizens and requested that he submit a preliminary report to the Sub-Commission at its fifty-third session, a progress report at its fifty-fourth session and a final report at its fifty-fifth session.

7. The present report first examines the rights of non-citizens under the International Convention on the Elimination of All Forms of Racial Discrimination and the jurisprudence of the Committee on the Elimination of Racial Discrimination.

8. Second, it considers other international standards relevant to non-citizens. International instruments considered include the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Law Commission's draft articles on the nationality of natural persons in relation to the succession of States;[4] the Rome Statute of the International Criminal Court; and the 1985 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live. The report also considers the relevant jurisprudence, concluding observations and comments, and general comments/recommendations of the relevant treaty bodies, including General Recommendation XI adopted by CERD; the Human Rights Committee's General Comment 15 on the position of aliens under the Covenant; General Comment 13 of the Committee on Economic, Social and Cultural Rights on the right to education; and General Recommendation 21 of the Committee on the Elimination of Discrimination against Women.[5]

9. Third, it looks at regional developments, particularly in Europe. The report considers the European Convention on Human Rights and its jurisprudence, the European Social Charter, the Charter of Fundamental Rights of the European Union, the European Charter for Regional or Minority Languages, the European Convention on Nationality, and the European Convention on the Participation of Foreigners in Public Life at Local Level.

10. Fourth, the report examines further issues relating to the rights of non-citizens. The report specifically focuses on distinctions among non-citizens, trafficking in women and children, and the right to leave and return.

11. Finally, the report presents its tentative conclusions and recommendations.

12. The Special Rapporteur would like to thank all those who offered suggestions, comments and critiques on this preliminary study. In particular, he offers his gratitude to his colleagues on the Sub-Commission, to non-governmental organization and government representatives who addressed this body at its previous session, and to Mr. Patrick Tarn of Migrant Rights International, Mr. Rick Towle and Ms. Ngozi Ada Maduakoh from the Office of the United Nations High Commissioner for Refugees (UNHCR), and Ms. Jelena Pejić from the International Committee of the Red Cross. The Special Rapporteur would also like to express his sincere appreciation to Ms. Marta Dora Vila, Ms. Kelle Kleschnick, Mr. Robert Phelan and Mr. Bret Thiele for their assistance in preparing this report.

II. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

A. Convention provisions

13. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination in article 1, paragraph 1, which states:

> "... the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

14. The general definition of discrimination found in article 1, paragraph 1, is, however, qualified by article 1, paragraph 2, which states:

> "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."

15. Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination does not affect how States bestow citizenship. Article 1, paragraph 2, is further defined in article 1, paragraph 3, which states:

> "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

16. The International Convention on the Elimination of All Forms of Racial Discrimination does not, however, pre-empt the rights of non-citizens enumerated in other international instruments. In its General Recommendation XI on non-citizens, CERD stated that article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination "must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights". The rights of non-citizens within the context of these and other instruments will be examined in section III below.

B. CERD jurisprudence

17. CERD has adopted certain views on the rights of non-citizens, reflecting its mandate under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination to consider communications. CERD has held that lawful distinctions between citizens and non-citizens must not be applied in a racially discriminatory manner. Following are synopses of CERD's views; please refer to the addendum for greater detail.

C. CERD concluding observations

18. CERD has also reflected its continuing concern about various forms of discrimination against non-citizens in its consideration of several States parties' reports. In doing so, CERD has made concluding observations and comments on the rights of non-citizens with regard to numerous countries, reflecting its mandate under the Convention to address discrimination against non-citizens.

19. For example, CERD has stated that under article 5 of the Convention, States have an obligation to guarantee the civil, political, economic, social and cultural rights of the whole population and not just citizens. Indeed, CERD has often reaffirmed its view that economic, social and cultural rights are to be enjoyed without discrimination, including discrimination against non-citizens.

20. For instance, CERD has often expressed concern about discrimination against foreign workers, their spouses and their children. Indeed, CERD has stated that States must enact measures equally to protect citizens and non-citizens from discrimination.

21. Similarly, CERD has often expressed concern about the exploitation of foreign workers including practices of debt bondage, passport deprivation, illegal confinement, and physical assault including rape.

22. CERD has also stated that, under article 5, the free choice of employment, including access to all professions and trades, must be guaranteed to foreigners.

23. In addition, CERD has stated that children of foreign workers are entitled under the Convention to join their parents in the host State and to education in their own language.

24. CERD has affirmed that article 5 forbids discrimination in employment, housing and education and that article 6 protects equal access to courts and administrative bodies regardless of citizenship status.

25. CERD has also expressed concern regarding differing immigration quotas depending upon the region or country from which an immigrant originates.

26. Like other treaty bodies, CERD has expressed particular concern about differing citizenship treatment given non-national female spouses vis-à-vis non-national male spouses.

27. CERD has stated that legislation concerning asylum must treat all asylum-seekers equally without regard to national origin.

28. For summaries and citations of these and other relevant concluding observations please refer to the addendum at paragraphs 2-23.

III. OTHER RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS RELATING TO NON-CITIZENS

A. Charter of the United Nations

29. The rights of non-citizens are protected in a number of international instruments that embody the principles of equality and non-discrimination. The Charter, for example, contains a non-discrimination clause in article 1, paragraph 3, which states that one purpose of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms *for all* without distinction as to race, sex, language, or religion" (emphasis added).

B. Universal Declaration of Human Rights

30. The Universal Declaration of Human Rights states in article 2, paragraph 1, that:

> "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

31. It should be noted that the Charter applies to "all" and the Universal Declaration on Human Rights applies to "everyone". Hence, both instruments protect all persons, including non-citizens, from racial discrimination and other forms of discrimination. The use of the words "such as" in article 2, paragraph 1, of the Universal Declaration of Human Rights indicates that this is not an exhaustive list, and makes clear that the operative phrase is: "without distinction of *any kind*" (emphasis added). As Professor Richard Lillich has noted, although this list omits nationality, "this omission is not fatal ... because the list clearly is intended to be illustrative and not comprehensive".[6] Professor Lillich also noted that "nationality would appear to fall into the category of a 'distinction of any kind'".[7]

32. The Universal Declaration of Human Rights also provides in article 15 that "[e]veryone has the right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality".

C. International Covenant on Civil and Political Rights

1. Covenant provisions

33. The provisions set forth in the International Covenant on Civil and Political Rights apply generally to non-citizens. Article 2, paragraph 1, of the International Covenant on Civil and Political Rights states:

> "Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis added).

34. There are a few provisions of the International Covenant on Civil and Political Rights that distinguish between citizens and non-citizens. For example, article 25 of the Covenant states:

> "Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> "(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> "(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> "(c) To have access, on general terms of equality, to public service in his country."

35. Article 13 specifically relates to non-citizens in stating:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or person or persons especially designated by the competent authority."

36. Article 4 allows derogation from certain rights under the Covenant in certain circumstances, stating in paragraph 1:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

37. It must be noted that, unlike the general anti-discrimination clause found in article 2, paragraph 1, the derogation clause found in article 4, paragraph 1, does not contain "national origin" as a criteria upon which a State party cannot discriminate. This omission, according to the *travaux préparatoires*, was intentional because the drafters of the Covenant understood that States may, in time of national emergency, have to discriminate against non-citizens within their territory.

2. General Comment 15

38. The rights of aliens are also set forth in General Comment 15 adopted by the Human Rights Committee in 1986 as an authoritative interpretation of the relevant provisions of the International Covenant on Civil and Political Rights. The Committee reiterated that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens". Non-citizens "receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof".

39. The Human Rights Committee observed that it would be helpful to state the position of aliens under the International Covenant on Civil and Political Rights because it found that States parties had "often failed to take into account that each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction'".

40. As noted above, General Comment 15 states that "in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness". Paragraph 2 clarifies the general rule that "each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens", the only exceptions being those expressly articulated in article 25 (right to participate in government), which applies only to citizens, and article 13 (expulsion), which applies only to aliens.

41. The Committee noted that "[a] few constitutions provide for equality of aliens with citizens"; however, General Comment 15 reflects the Committee's concern that "[i]n certain cases ... there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens".

42. The Committee stressed that "[t]he Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate". Furthermore, the Committee placed on States the responsibility to "ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction".

43. In paragraph 7, the Committee expressly reiterated the fundamental rights of aliens protected by the Covenant and that "[t]here shall be no discrimination between aliens and citizens in the application of [those] rights". The full text of the paragraph states:

> "Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at

law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant."

44. General Comment 15 clarifies an alien's right to freedom of movement within a territory, and the right to leave that territory "may only be restricted in accordance with article 12, paragraph 3" of the International Covenant on Civil and Political Rights.[8]

45. General Comment 15 also addresses the expulsion of aliens. According to paragraph 9, "[a]n alien who is expelled must be allowed to leave for any country that agrees to take him". Paragraph 10, while noting that the International Covenant on Civil and Political Rights regulates only the procedure and not the substantive grounds for expulsion, stresses the right of appeal and review: "[a]n alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one". The right to appeal may only be abrogated when "'compelling reasons of national security' so require".

3. Human Rights Committee jurisprudence

46. The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, has adopted the following views on the rights of non-citizens, reflecting its mandate under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights to consider communications submitted to it.

47. With respect to the expulsion of aliens pursuant to article 13, the Human Rights Committee has held that when an alien challenges that expulsion pursuant to article 13, s/he is protected by the principles of fair procedures embodied in article 14 as well as other articles that may be relevant.

48. Furthermore, the Human Rights Committee has held that if extradition or expulsion results in a real risk that the alien's rights under the Covenant will be violated in the receiving jurisdiction, the State party itself may be in violation of the Covenant.

49. For summaries and citations of this and other relevant jurisprudence, please refer to the addendum at paragraphs 24-45.

4. Human Rights Committee concluding observations

50. The Human Rights Committee has also adopted a number of concluding observations and comments regarding the rights of non-citizens under the Covenant.

51. For example, the Human Rights Committee has consistently reaffirmed that, with the exceptions of articles 13 and 25, the rights under the Covenant must be respected and ensured with regard to all persons without distinction of any kind.

52. Regarding the freedom of movement as protected by article 12 of the Covenant, the Human Rights Committee has stated that States parties shall guarantee that right to everyone lawfully within the territory of the State and thus, States parties must, if necessary, amend their domestic legislation accordingly.

53. Likewise, with respect to article 27, the Human Rights Committee found that the rights of ethnic, religious or linguistic minorities to enjoy their own culture and to profess and practise their own religion or use their own language cannot be restricted to citizens.

54. Furthermore, the Human Rights Committee noted that the right to be protected from arbitrary or unlawful interference with privacy, family, home or correspondence (art. 17) and the right of men and women of marriageable age to marry (art. 23) must be guaranteed equally to citizens and permanent residents alike.

55. For summaries and citations of these and other relevant concluding observations, please refer to the addendum at paragraphs 46-61.

D. International Covenant on Economic, Social and Cultural Rights

1. Covenant provisions

56. The International Covenant on Economic, Social and Cultural Rights establishes rights that apply to everyone, regardless of citizenship.[9] Article 6 grants everyone the right to work. Article 7 grants everyone just and favourable working conditions. Article 8 ensures everyone the right to establish trade unions. Article 9 guarantees the right to social security for everyone. Article 11 ensures the right of everyone to an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions. Article 12 grants the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Article 13 requires States parties to recognize the right of everyone to education, and article 15 grants everyone the right to take part in cultural life.

57. The International Covenant on Economic, Social and Cultural Rights also can be construed to forbid discrimination on the basis of nationality. Article 2, paragraph 2, states:

> "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

58. Article 2, paragraph 3, however, creates a specific exception to this rule only for developing countries: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." That provision does not apparently permit discrimination between nationals of different countries, only between nationals of the State party and non-nationals.

2. General Comments

59. The Committee on Economic, Social and Cultural Rights addressed non-discrimination and equal treatment in regard to the right to education in General Comment No. 13 adopted at its twenty-first session in 1999. It noted that educational institutions must be accessible to everyone, without discrimination, within the jurisdiction of the State party. The Committee confirmed that "the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status". It further noted, "the prohibition against discrimination enshrined in article 2 (2) of the Convention is subject to neither progressive realization nor the availability of resources; it applies fully to all aspects of education and encompasses all internationally prohibited grounds of discrimination".

60. With respect to the right to health, the Committee has stated in its General Comment No. 14 that "the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health". Therefore, according to the broad non-discrimination clause articulated in General Comment No. 14, States parties to the Covenant cannot discriminate against non-citizens with respect to the right to health if that discrimination intentionally or effectually nullifies or impairs their equal enjoyment or exercise of that right.

61. With respect to the right to adequate housing, the Committee has adopted General Comment No. 4 which states that "individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination." The reference to article 2 (2) is important. Article 2 (2) obliges States parties to guarantee that the rights enumerated in the Covenant are exercised without discrimination of any kind as to other status. Furthermore, article 2 (2) is the same article upon which the Committee based its broad non-discrimination view in General Comment No. 14. It follows that the right to adequate housing, as articulated in General Comment No. 4, must be guaranteed by States parties with respect to citizens and non-citizens alike.

3. Committee on Economic, Social and Cultural Rights concluding observations

62. The Committee on Economic, Social and Cultural Rights has considered numerous reports submitted by States parties under articles 16 and 17 of the Covenant regarding its implementation and the situation of non-nationals, including refugees and immigrants.

63. For example, the Committee has held that social services and access to an adequate standard of living, including adequate housing, food and clothing, may not be applied in a discriminatory manner vis-à-vis citizens and others lawfully present in the territory of the State, including asylum-seekers and refugees. Indeed, the Committee has often urged States to address discrimination, particularly in the areas of housing, access to land, education, employment and social benefits, against groups of non-citizens including asylum-seekers, refugees and the Roma.

64. The Committee has stated that if a State provides loans for post-secondary education they must, pursuant to article 13 (1) (c), be made equally available to citizens, permanent residents, and accepted asylum-seekers and refugees.

65. The Committee has also consistently urged States to take measures necessary to ensure that unemployment does not disproportionately affect non-citizens, including asylum-seekers and refugees, vis-à-vis citizens.

66. The Committee has held that States may not discriminate against non-citizens lawfully within their respective territories as to the right of everyone to form and join trade unions, as protected by article 8.

67. The Committee has criticized legislation that provides immigration status in a discriminatory manner depending on the origin of emigration. The Committee is also of the view that States may not discriminate with respect to immigration and citizen status between men and women.

68. For summaries and citations of these and other relevant concluding observations please refer to the addendum at paragraphs 62-89.

E. Convention on the Elimination of All Forms of Discrimination against Women

1. Convention provisions

69. The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention) establishes the rights of women with regard to nationality. These rights become particularly important when a woman marries a national of a country other than her own. In order to protect women's nationality, article 9 of the Women's Convention provides:

> "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
>
> "2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

70. The Committee on the Elimination of Discrimination against Women (CEDAW) noted in its General Recommendation 21 on equality in marriage and family relations, adopted at its thirteenth session in 1992, that the Women's Convention focuses on preventing the loss of women's nationality because:

> "Nationality is critical to full participation in society. In general, States confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness. Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence. Nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality."[10]

2. CEDAW concluding observations

71. CEDAW has made relevant concluding observations and comments with regard to a number of countries.

72. Importantly, CEDAW has consistently expressed concern for non-citizen women, including foreign women workers in domestic service, asylum-seekers and women living clandestinely in the territory of a State party, and has stated that the Women's Convention requires States parties to ensure the protection of the full human rights of all women, including foreign and immigrant women.

73. CEDAW has also consistently condemned laws whereby women cannot transmit their nationality to their children in the same way that fathers can.

74. For summaries and citations of these and other relevant concluding observations, please refer to the addendum at paragraphs 90-98.

F. Convention on the Rights of the Child

1. Convention provisions

75. The Convention on the Rights of the Child states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". In addition, article 2, paragraph 1, of the Convention requires States parties to:

> "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

76. The Convention on the Rights of the Child applies to all children regardless of their race or citizenship status. Because States have an obligation to "each child within their jurisdiction," States may not distinguish between children based on their citizenship or race; all children under the jurisdiction of the State must be treated equally.

2. Committee on the Rights of the Child concluding observations

77. The Committee on the Rights of the Child has made concluding observations and comments on the rights of non-citizen children with regard to several countries, reflecting its mandate to foster implementation of the Convention on the Rights of the Child.

78. The Committee has stated that domestic legislation must ensure that the rights guaranteed under the Convention protect all children, including non-citizens.

79. The Committee has also stated that health, education and social services must be made available to both citizens and child asylum-seekers without discrimination.

80. The Committee has also expressed serious concern regarding the detention of alien children, including children seeking asylum, and that legislation allowing such detention must be removed in order to comply with the Convention.

81. Likewise, the Committee has criticized legislation whereby the ability of non-citizen children to acquire citizenship differs depending on whether the child's mother or father is a citizen of the State party.

82. The Committee has stated that all children born within a State party, regardless of nationality, should have their births registered.

83. Furthermore, the Committee has stated that when a State party deports an alien, professional opinions on the impact of such decisions upon the children of the deported persons must be systematically consulted and taken into consideration.

84. For summaries and citations of these and other relevant concluding observations, please refer to the addendum at paragraphs 99-118.

G. 1951 Convention relating to the Status of Refugees and its 1967 Protocol

85. The 1951 Convention relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol contain a number of provisions related to the rights of non-citizens. Most of these provisions protect the rights of refugees by reference to nationals or other classes of non-citizens.

86. The benefits provided under the Refugee Convention and its Protocol have different levels of applicability depending on the nature of the refugee's sojourn or residence in the receiving country.[11]

87. Some rights, including the most fundamental, are extended to all refugees. Relevant provisions of the Convention include the non-discrimination clause (art. 3), the exemption from legislative reciprocity (art. 7, para. 1), the exemption from exceptional measures (art. 8), the right to acquisition of movable and immovable property (art. 13) and the prohibition of expulsion or return (refoulement) (art. 33).

88. Other basic rights are applicable to any refugee present within the country of refuge. These rights include the freedom to practise their religion and freedom as regards the religious education of their children (art. 4), the right to be included in rationing measures (art. 20), the right to public education (art. 22) and the right to identity papers (art. 27). These rights apply to refugees whether legally or illegally present within a country (see art. 31).

89. Other provisions apply only to refugees considered legally within the receiving country. These provisions include the right to self-employment (art. 18), the right to freedom of movement (art. 26) and the right not to be expelled except on grounds of national security or public order (art. 32).

90. Still other provisions apply only to refugees lawfully staying in the receiving country. These provisions include the right to association (art. 15), the right to wage-earning employment (art. 17), the right to practise liberal professions (art. 19), the right to housing (art. 21), the right to public relief (art. 23), the right to the protection of labour legislation and social security (art. 24) and the right to travel documents (art. 28).

91. Similarly, the protection of intellectual property (art. 14), the right to access to courts (art. 16, para. 2) and the right to administrative assistance (art. 25) apply to refugees in States where they have their habitual residence.

92. Many of these provisions, however, are qualified by stating that States parties are only required to extend them to refugees to the same extent that they do so to other groups within their respective territory. These provisions are divided into two categories as described below.

93. Under the Refugee Convention, States parties shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to religion (art. 4), protection of intellectual property (art. 14), access to courts and legal assistance (art. 16), rationing measures (art. 20), elementary education (art. 22, para. 1), public relief and assistance (art. 23), labour legislation and social security (art. 24), as well as fiscal taxes and charges (art. 29).

94. States parties shall accord to refugees treatment no less favourable than that accorded to aliens generally with respect to exemption from legislative reciprocity (art. 7, para. 1), acquisition of property (art. 13), non-political and non-profit-making associations and trade unions (art. 15), wage-earning employment (art. 17), self-employment (art. 18), professions (art. 19), housing (art. 21), post-elementary education (art. 22, para. 2) and freedom of movement (art. 26).

H. Convention relating to the Status of Stateless Persons

95. Similar to the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons (Stateless Persons Convention) establishes rights to treatment for stateless persons that is no less favourable than that provided to other specific groups.

96. Pursuant to the Stateless Persons Convention, States parties shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children (art. 4), intellectual property rights (art. 14), access to courts of law (art. 16), rationing measures (art. 20), the right to elementary education (art. 22, para. 1), public relief (art. 23), and the protection of labour legislation and social security (art. 24). Furthermore, States cannot impose upon stateless persons duties, charges, or taxes other than or higher than those imposed upon their nationals (art. 29).

97. With respect to other provisions, the Stateless Persons Convention obligates States parties to treat stateless persons no less favourably than aliens generally. These provisions include the right to acquire movable and immovable property (art. 13), the right of association (art. 15), the right to engage in wage-earning employment (art. 17), the right to engage in self-employment (art. 18), the right to engage in the liberal professions (art. 19), the right to housing (art. 21), the right to higher education (art. 22, para. 2), the right to administrative assistance (art. 25) and the freedom of movement (art. 26).

98. The Stateless Persons Convention also mandates that States parties must provide any stateless person in their territory with identity papers (art. 27) and issue travel document to stateless persons lawfully staying in their territory (art. 28).

I. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

99. A major development with respect to the rights of non-citizens occurred when the General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention) by its

resolution 45/158 of 18 December 1990. The Migrant Workers Convention was the result of a request by the Economic and Social Council to the Sub-Commission to study the condition of migrant workers.[12] The Sub-Commission, in its resolution 6 (XXVI) of 19 September 1973, appointed Ms. Halima Warzazi as Special Rapporteur to prepare a study on the exploitation of labour through illegal migration. Her study[13] recommended, *inter alia*, that the United Nations should be involved in order to ensure that all humanitarian aspects of the problem of the exploitation of migrant workers are covered.

100. The Migrant Workers Convention covers all migrant workers and their families and provides for non-discrimination with respect to rights of migrant workers (art. 7), the assurance of fundamental human rights (arts. 8-24), equality of treatment between nationals and migrant workers in regard to work conditions and pay (art. 25), the right to participate in trade unions (art. 26), equal access to social security (art. 27), the right to emergency medical care (art. 28), and equality of access to public education (art. 30). In addition, States parties must ensure respect for workers' cultural identity (art. 31) and inform migrant workers of their rights under the Convention (art. 33).

101. The pace of ratification of the Migrant Workers Convention has not been particularly rapid. As of 7 May 2001, the Convention had been ratified or acceded to by 16 States - Azerbaijan, Bolivia, Bosnia and Herzegovina, Cape Verde, Colombia, Egypt, Ghana, Guinea, Mexico, Morocco, the Philippines, Senegal, Seychelles, Sri Lanka, Uganda and Uruguay - and signed by Bangladesh, Chile, Comoros, Guatemala, Guinea-Bissau, Paraguay, Sao Tome and Principe, Sierra Leone, Tajikistan and Turkey (20 States parties are required for the Convention to come into force). It has also been reported that Algeria, Ecuador, El Salvador and Indonesia are taking steps towards prompt accession. In order to encourage ratification of the Migrant Workers Convention, the Secretary-General, the Commission on Human Rights and the Sub-Commission have called upon all States to consider signing and ratifying or acceding to the Convention as a matter of priority. Because migrant workers are non-citizens, and therefore are included in any instruments regarding the rights of non-citizens, they are included in the analysis of this preliminary study.

J. Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live

102. In 1976 Baroness Elles completed the Sub-Commission's ground-breaking study on the human rights of individuals who are not nationals of the country in which they live.[14] The study included the very early developments in the jurisprudence of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights. The study did not, however, focus on the precise problems faced by CERD, for example, in the context of the restrictive language in the International Convention on the Elimination of All Forms of Racial Discrimination, such as the difficulties arising from distinctions among non-citizens.

103. On 13 December 1985, the General Assembly adopted, by consensus, resolution 40/144 containing the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Declaration). The Declaration was the result of the Sub-Commission's study on the rights of non-citizens and covers all individuals who are not

nationals of the State in which they are present. The Declaration provides for the respect of fundamental human rights of aliens, including the right to life, the right to privacy, equality before the courts and tribunals, freedom of opinion and religion, and retention of language, culture and tradition (art. 5). In addition, the Declaration prohibits individual or collective expulsion on discriminatory grounds (art. 7) and provides for trade union rights, the right to safe and healthy working conditions and the right to medical care, social security, and education (art. 8). The provisions of the Declaration are reflected in the Human Rights Committee's General Comment 15 (see sect. III.C.2. above).

104. Individuals who are not nationals of the country in which they live can generally be divided into several categories: migrant workers, refugees, documented and undocumented aliens, and individuals who have lost their nationality. All individuals in all categories are protected under the Declaration. Article 1 defines the term "alien" as "*any* individual who is not a national of the State in which he or she is present" (emphasis added). Article 5, paragraph 1, grants "aliens" specific rights, without specifying any particular subgroup of aliens. Articles 9 and 10 refer to "no alien" and "any alien", respectively.

105. It should be noted that article 5 (1) (e) may allow States to distinguish between classes of aliens by restricting aliens' freedom of thought, opinion, conscience and religion, subject "only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others". Hence, if a State were to determine that distinguishing between documented and undocumented aliens is necessary to protect public safety, such a distinction would not be forbidden by the Declaration.

106. It should also be noted that article 4 requires that aliens observe the laws of the State in which they reside or are present as well as respect the customs and traditions of the people of that State.

K. International Law Commission

107. The International Law Commission has developed an instrument regarding the impact of State succession on the nationality of natural and legal persons. At its fifty-first session, held in Geneva in July 1999, the Commission adopted the text of draft articles on nationality of natural persons in relation to the succession of States and recommended to the General Assembly the adoption, in the form of a Declaration, of the draft articles. In its resolution 55/153 of 12 December 2000, the Assembly took note of the draft articles and reiterated its invitation to Governments to submit comments and observations on the question of a convention on nationality of natural persons in relation to the succession of States, and decided to revisit this question at its fifty-ninth session.

108. Part I of the draft articles applies to all cases of State succession and conflicts of nationality arising therefrom; Part II contains specific provisions on attribution and withdrawal of nationality and on the right of option applicable in different categories of succession of States.

109. The draft articles on nationality of natural persons in relation to the succession of States are primarily concerned with the prevention of statelessness. Article 1 of the draft articles is the foundation for preventing statelessness. Specifically, article 1 provides that: "[e]very individual

who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles".

110. According to article 5, habitual residents of the successor State are presumed to acquire nationality of the successor State on the date of succession. Article 12 places the unity of the family above the matter of habitual residence, indicating that States concerned shall take all appropriate measures to allow families to remain together or to be reunited. According to article 13, all children born after succession who have not acquired any nationality have the right to the nationality of the territory in which they are born. According to article 15, the method of determining nationality shall be non-discriminatory. Article 16 follows the non-discrimination clause by prohibiting arbitrary decisions concerning nationality issues, stating that persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State, or any right of option to which they are entitled in relation to the succession of States. Further procedural requirements are set forth in article 17, which states that:

> "[a]pplications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay. Relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review."

111. The draft articles clearly, comprehensively and procedurally prevent statelessness upon succession of a State. States are not required, however, to grant nationality to individuals having no effective link with the State unless this would result in treating those persons as if they were stateless.

L. The International Criminal Court

112. On 17 July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court. Article 5 enumerates four categories of crimes that fall within the jurisdiction of the Court: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such". The language used by the Statute to define "genocide" is taken directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In addition, under article 7 (h), "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law" is also considered a crime against humanity. Because non-citizens are ordinarily of a different national group, the International Criminal Court will apparently protect non-citizens from serious abuses committed with intent to cause annihilation of the group, as well as persecution.

113. As of 7 May 2001, 30 States – Andorra, Argentina, Austria, Belgium, Belize, Botswana, Canada, Dominica, Fiji, Finland, France, Gabon, Germany, Ghana, Iceland, Italy, Lesotho, Luxembourg, Mali, Marshall Islands, New Zealand, Norway, San Marino, Senegal,

Sierra Leone, South Africa, Spain, Tajikistan, Trinidad and Tobago, and Venezuela - had ratified the Rome Statute. Ratification by 60 States is required for the Statute to come into force. An additional 109 States had signed but not yet ratified the Statute.

M. International Labour Organization (ILO)

114. A number of conventions adopted by and ratified under the auspices of the International Labour Organization affect the rights of non-citizens, particularly those addressing the rights of migrant workers.

115. For example, the ILO Migration for Employment Convention (Revised), 1949 (Convention No. 97) requires, *inter alia*, that States parties provide adequate and free service to assist migrants for employment, and in particular to provide them with accurate information. Each State party should also maintain appropriate medical services ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey, and on arrival in the territory of destination.

116. ILO Convention No. 97 further provides that migrant workers receive treatment no less favourable than that which is applied to nationals with respect to remuneration; membership in trade unions and the enjoyment of the benefits of collective bargaining; accommodation; and social security including legal provision regarding employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme.

117. The ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (Convention No. 143) provides additional provisions regarding the rights of migrant workers. This Convention requires each State party to respect the basic human rights of all migrant workers.

118. Other provisions apply only to migrant workers legally in the territory of a State party and include enjoyment of equality of treatment with nationals in respect of security of employment, the provision of alternative employment, relief work and retraining.

119. ILO Convention No. 143 also provides that States parties pursue a national policy designed to promote and to guarantee equality of opportunity and treatment in respect of employment, occupation, social security, trade union and cultural rights, and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

IV. RELEVANT REGIONAL HUMAN RIGHTS STANDARDS RELATING TO NON-CITIZENS

120. In addition to the developments at the global level, there have been very significant regional developments concerning the rights of non-citizens, particularly in Europe.

A. European Convention on Human Rights and its jurisprudence

1. Convention Provisions

121. The European Convention in article 14 forbids discrimination, stating that:

> "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

122. The Seminar on Exclusion, Equality Before the Law and Non-Discrimination organized by the Council of Europe in 1994 noted that:

> "Article 14 [of the European Convention on Human Rights] does not forbid every difference in treatment. Equality does not necessarily mean identical treatment in every instance. A differentiation does not constitute discrimination if the aim is to achieve a purpose which is legitimate and if the criteria used are reasonable and objective .... Only differentiation which is not factually justified is inadmissible. According to the European Court's established case-law a distinction is discriminatory ... if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'."[15]

123. In addition, article 16 of the European Convention states that nothing in article 14, among others, "shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens".[16]

124. "The provisions of the European Convention on Human Rights (European Convention) are in principle applicable without any distinction to citizens within any given State, citizens of other member States, aliens or stateless persons."[17] The European Convention does not, however, cover certain rights pertaining to non-citizens. For example, there is no right to be admitted to a country and no protection from deportation or other removal.[18]

125. Furthermore, on 4 November 2000 the Council of Europe adopted Protocol No. 12 to the European Convention on Human Rights which contains a broader non-discrimination clause guaranteeing non-discrimination with respect to "any right set forth by law" rather than just those rights enumerated in the Convention.

126. The European Court of Human Rights has also considered the rights of non-citizens under article 8 of the Convention. Article 8 states that "1. Everyone has the right to respect for his private and family life ... [and] 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security ..."

2. European Court of Human Rights jurisprudence

127. A key judgement regarding article 8 occurred on 21 June 1988 in the case of *Berrehab v. the Netherlands*.[19] In *Berrehab*, the Court defined for the first time the effect of article 8 on the deportation of non-citizens. The substance of the decision was that where the non-citizen has real family ties in the territory of the State from which he is ordered deported, and the deportation measure is such as to jeopardize the maintenance of those ties, the deportation is justified with regard to article 8 only if it is proportionate to the legitimate aim pursued. In other words, the deportation is justified only if the interference with family life is not excessive with respect to the public interest to be protected. The public interest often balanced against the right to respect for family life is the State's interest in maintaining public order and arises in the context of non-citizens convicted of criminal offences.

128. Please refer to the addendum at paragraphs 119-133 for further jurisprudence of the European Court of Human Rights.

B. European Social Charter

129. The rights embodied in the European Social Charter, with the exception of four qualified articles, protect nationals and foreigners "insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned."[20]

130. The exceptions include article 12, paragraph 4, article 13, paragraph 4, article 18, and article 19, which include various qualifications to the general rule articulated above.

131. Article 12, paragraph 4, involves the right to social security and requires Contracting Parties to "take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure (a) equal treatment with their own nationals of the national of other Contracting Parties in respect of social security rights ...".

132. Article 13, paragraph 4, protects the right to social and medical assistance and requires Contracting Parties to apply the provisions of the article "on an equal footing with their nationals to national of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance".

133. Article 18 deals with the right to engage in a gainful occupation in the territory of other Contracting Parties and requires Contracting Parties to ensure that their respective regulatory schemes facilitate the ability of nationals from other Contracting Parties to engage in such employment.

134. Article 19 guarantees the right of migrant workers and their families to protection and assistance and applies to migrant workers and their families lawfully within the territory of the Contracting Party concerned. The provisions embodied in article 19 include those addressing the maintenance of free services to assist such workers, particularly to obtain information; the facilitation of departure, journey and reception of migrant workers and their families; and the

right to treatment no less favourable than that accorded to nationals with respect to remuneration, employment and working conditions, membership in trade unions, enjoyment of the benefits of collective bargaining, accommodation, employment taxation, and access to legal proceedings relating to matters referred to in article 19.

C. Charter of Fundamental Rights of the European Union

135. The Charter of Fundamental Rights of the European Union, adopted in December 2000, includes a broad array of civil, economic, labour, political, and social rights.

136. Most rights are guaranteed to everyone. The exceptions are articles 15, 34, 39, 40, 42, 43, 44, 45 and 46.

137. Article 15 guarantees the freedom to choose an occupation and right to engage in work. While stating in paragraph 1 that "[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation," paragraph 2 limits to citizens of the European Union the freedom to seek employment, to work, to exercise the right of establishment, and to provide services in any member State. Furthermore, paragraph 3 entitles nationals of third countries who are authorized to work in the territories of the member States to working conditions equivalent to those of citizens of the European Union.

138. Article 34, dealing with social security and social assistance, protects "[e]veryone residing and moving legally within the European Union".

139. Articles 39 and 40 involve, respectively, the right to vote and to stand as a candidate at elections to the European Parliament and at municipal elections, and are reserved to citizens of the European Union.

140. Articles 42, 43, and 44 involve, respectively, the right of access to European Parliament, Council, and Commission documents; the right to refer cases to the Ombudsman of the European Union; and the right to petition the European Parliament. These rights are reserved to citizens of the European Union and any natural or legal person residing or having its registered office in a member State.

141. Article 46 guarantees to citizens of the European Union in the territory of a third country in which the member State of which s/he is a national is not represented, the protection by the diplomatic or consular authorities of any member States on the same conditions as the nationals of that member State.

D. European Charter for Regional or Minority Languages

142. The European Charter for Regional or Minority Languages aims to protect and promote the historical regional or minority languages of Europe. It was adopted, on the one hand, in order to maintain and to develop Europe's cultural traditions and heritage, and on the other, to respect an inalienable and commonly recognized right to use a regional or minority language in private and public life.

143. The Charter clearly differentiates between "minorities" and "non-citizens" in its definition of "regional or minority languages". Article 1 of the Charter states that the term "'regional or minority languages' ... does not include ... the languages of migrants."

144. The European Charter for Regional or Minority Languages entered into force on 3 January 1998. As of 7 May 2001, 13 States - Croatia, Denmark, Finland, Germany, Hungary, Liechtenstein, the Netherlands, Norway, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom of Great Britain and Northern Ireland - had ratified the Charter. An additional 12 - Austria, Cyprus, the Czech Republic, France, Iceland, Italy, Luxembourg, Malta, Romania, Slovakia, Ukraine and the former Yugoslav Republic of Macedonia - had signed but not yet ratified the Charter.

145. In 1995, the Council of Europe Press published a booklet entitled "Tackling racism and xenophobia: practical action at the local level," one of a series of booklets accompanying the report *Community and Ethnic Relations in Europe* and containing an account of an expert meeting held in Berlin in 1993 on practical action at the local level to combat racism and xenophobia. Whereas the European Charter for Regional or Minority Languages does not apply to migrants, according to the booklet, the Council of Europe considers that "community relations" includes all aspects of the relations between migrants or ethnic groups of "immigrant origin" and the host society. Although it is unclear how far back the Council would trace "immigrant origin", it is conceivable that "community relations" is intended to include both migrants and national minorities.

146. The Parliamentary Assembly of the Council of Europe has issued several recommendations that may affect the rights of non-citizens, including recommendations 1134 (1990) and 1177 (1992) on the rights of minorities, as well as recommendation 1300 (1996) on the protection of the rights of minorities.[21]

147. Other relevant developments in the Council of Europe include recommendation No. R (92) 12 on community relations, adopted in 1992 by the Committee of Ministers;[22] the recommendations of the Committee of Inquiry into Racism and Xenophobia of the European Parliament (1991);[23] resolution of 5 October 1995 of the European Council and the representatives of the Governments of the member States on the fight against racism and racial discrimination in the fields of employment and social affairs;[24] and the 1990 Copenhagen Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe.[25]

E. European Convention on Nationality[26]

148. One of the most significant norm-setting developments with regard to the rights of non-citizens in Europe is the European Convention on Nationality. Article 4 of that Convention lists the principles upon which the rules of nationality of each State party shall be based, stating that:

> "(a) everyone has the right to a nationality; (b) statelessness shall be avoided; (c) no one shall be arbitrarily deprived of his or her nationality; [and] (d) neither marriage nor

the dissolution of a marriage between a national of a State party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse."

149. The European Convention on Nationality was opened for signature on 6 November 1997. As of 7 May 2001, four States - Austria, Moldova, the Netherlands and Slovakia - had ratified the Convention. Seventeen additional States - Albania, Bulgaria, the Czech Republic, Denmark, Finland, France, Greece, Hungary, Iceland, Italy, Norway, Poland, Portugal, Romania, the Russian Federation, Sweden and the former Yugoslav Republic of Macedonia - were signatories to the Convention.

150. The European Convention on Nationality also establishes the right to nationality of stateless persons. Article 6 states:

"1. Each State Party shall provide in its internal law for its nationality to be acquired *ex lege* by ... (b) foundlings found in its territory who would otherwise be stateless.

"2. Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality ...

" ...

"4. Each State Party shall facilitate in its internal law the acquisition of its nationality for ... (g) stateless persons and recognized refugees lawfully and habitually resident on its territory."

F. Convention on the Participation of Foreigners in Public Life at Local Level

151. In the Convention on the Participation of Foreigners in Public Life at Local Level, each member State of the Council of Europe, considering that "the residence of foreigners on the national territory is now a permanent feature of European societies," undertakes to guarantee the freedoms of expression, assembly and association "on the same terms as to its own nationals" (art. 3) encourage and facilitate the establishment of "consultative bodies ... for the representation of foreign residents by local authorities" (art. 5) and "grant to every foreign resident the right to vote and to stand for election in local authority elections" (art. 6).

152. As of 7 May 2001, the Convention on the Participation of Foreigners in Public Life at Local Level had been ratified by six States - Denmark, Finland, Italy, the Netherlands, Norway and Sweden. Three additional States - Cyprus, the Czech Republic and the United Kingdom - were signatories. The Convention entered into force on 5 January 1997.

G. American Convention on Human Rights

153. The American Convention on Human Rights (American Convention), with the exception of articles 22 and 23, guarantees in article 1 the rights enumerated in the Convention to "all persons subject to [States Parties'] jurisdiction".

154. Article 22 of the American Convention, guaranteeing freedom of movement and residence, is restricted to "every person lawfully in the territory of a State Party".

155. Article 23 of the American Convention, guaranteeing the right to participate in government, is restricted to "every citizen".

156. Little Inter-American Court of Human Rights jurisprudence addressing the issue of the right of non-citizens has been located. One Advisory Opinion,[27] however, does touch upon this issue with respect to discriminatory naturalization and is summarized in the addendum at paragraphs 134-136.

H. African Charter on Human and Peoples' Rights

157. The African Charter on Human and Peoples' Rights (African Charter), with the exception of article 13 (1) and (2), guarantees the rights enumerated in the Charter to "every individual" or to "all peoples".

158. Article 13 (1) of the African Charter, guaranteeing the right to participate freely in government, and article 13 (2), guaranteeing the right of equal access to the public service, are restricted to "every citizen".

I. African Charter on the Rights and Welfare of the Child

159. The African Charter on the Rights and Welfare of the Child guarantees the rights therein to "every child" and states further that "[e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status" (art. 3).

160. Of particular note, this Charter states (in art. 6, para. 3) that every child is entitled to acquire nationality at birth.

V. FURTHER ISSUES RELATING TO THE RIGHTS OF NON-CITIZENS

A. Distinctions among non-citizens

161. Increasing distinctions are being made between different categories of non-citizens. This phenomenon is a particularly prevalent practice of supranational political or economic unions, such as the European Union[28] and the North American Free Trade Agreement (NAFTA).[29] As Michael Banton, Chairman of CERD, stated in his letter to the Sub-Commission, "such developments raise questions from the perspective of the International Convention on the Elimination of All Forms of Racial Discrimination".

162. In some respects these problems are not new. Baroness Elles noted in 1977 that violations had continued in many parts of the world, both extensively and frequently, against the human rights of non-citizens. In December 1997, the United Nations Seminar on Immigration, Racism and Racial Discrimination concluded that "many countries had experienced an upsurge

in racism, racial discrimination and xenophobia towards, and violence against, migrants and immigrants" (E/CN.4/1998/77/Add.1, annex, para. 8). Baroness Elles, in her study on the rights of non-citizens, concurred, stating that "[t]he individual who most frequently, both in point of time and of place, gets singled out for distinction from his fellow man is the alien".[30] Likewise, Asbjörn Eide, in his study for the Sub-Commission, noted in 1989 that:

> "[p]roblems related to aliens ... are sometimes cast in terms of race. Here, as in many other contexts, the notion of 'race' is used in a vague and imprecise way. Aliens often ... belong to different cultures and are sometimes of a different colour. The greater the apparent differences to the population in the country of residence, the more likely they are to be exposed to xenophobic sentiments and behaviour from segments of that population."[31]

163. The Human Rights Committee has noted that "States parties have often failed to take into account that each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction'."[32] Furthermore, Baroness Elles concluded that:

> "[t]he problem of the protection and treatment of aliens is not transient, temporary, or local, but continuing and universal. It is not an isolated problem, in point of time or of place, and therefore a universal approach is needed and an effort to reach universal consensus on this problem must be made."[33]

164. The rights of non-citizens enumerated in international instruments have been neither adequately nor universally protected and promoted. Baroness Elles concluded further that "[t]he application of the provisions of international human rights instruments to aliens is unclear and uncertain, and existing means of implementation inadequate."[34]

B. Roma/Gypsies

165. The Roma (Gypsies) pose a special problem in areas of race and non-discrimination. Gypsies are not aliens per se, but their citizenship rights are often not recognized. Further complicating the issue surrounding the rights of Gypsies is the concept of Gypsies as a "national minority" - a term which does imply citizenship.

166. Special concerns regarding the Roma have recently begun to be considered seriously by the international community. For example, since 1991, the Congress of Local and Regional Authorities of Europe (CLRAE) of the Council of Europe has organized hearings to address the situation of Gypsies in Europe.

167. Furthermore, on 16 August 2000 the Committee on the Elimination of Racial Discrimination adopted General Recommendation XXVII on discrimination against Roma. This General Recommendation, *inter alia*, recommended that States parties to the Convention "ensure that legislation regarding citizenship and naturalization does not discriminate against members of Roma communities".

168. On 17 August 2000, the Sub-Commission on the Promotion and Protection of Human Rights adopted decision 2000/109 in which it recommend that Mr. Y.K.J. Sik Yuen be appointed as Special Rapporteur with the task of preparing a comprehensive study on the human rights problems and protections of the Roma.

C. Trafficking in women and children

169. Trafficking in women is a global problem which takes place both between and within regions.[35] Women and children become vulnerable to trafficking because of social and economic relations of power, including the "economic disparity between the richest States or regions and the poorest". In many countries, large proportions of prostitutes are illegal immigrants - often trafficked women and girls.[36]

170. The 1985 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live did not focus on trafficking in women and children. There had been some relevant developments, however, prior to 1985: in 1951, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Trafficking Convention) entered into force. The Trafficking Convention cited four international instruments which were already in force at that time: (i) the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic; (ii) the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic; (iii) the International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children; and (iv) the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age. The purpose of the Trafficking Convention was to consolidate those four instruments.

171. Article 17 of the Trafficking Convention states, in part:

> "The Parties to the present Convention undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution."

172. Specifically, article 17 requires States to enact legislation to protect women and children while travelling, to warn the public of the dangers of trafficking, to take measures to prevent trafficking at ports of entry, and to make sure that the proper authorities are aware of the arrival of women who appear to be trafficking victims. Under article 19, countries agree to care for and repatriate trafficking victims.

173. A trafficking provision was included in the 1979 Convention on the Elimination of All Forms of Discrimination against Women. Article 6 reads: "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." As of 7 May 2001, 167 States had become parties to the Convention on the Elimination of All Forms of Discrimination against Women and an additional three had become signatories, thereby binding themselves not to contravene the object and purpose of the Convention.

174. The 1989 Convention on the Rights of the Child calls for the elimination of trafficking in children for any purpose. Article 11 requires States parties to "take measures to combat the illicit transfer and non-return of children abroad". Article 35 requires States parties to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form". Article 36 continues: "States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare."

175. In addition to those treaties, there have been a number of efforts to improve international mechanisms to stop trafficking. For example, in October 1994, the International Organization for Migration organized an international seminar on international responses to trafficking in migrants.

176. For the past few years, the International Labour Organization (ILO) has been actively involved in finding solutions to the problem of trafficking. In May 1996 the ILO collaborated with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Organization for Security and Cooperation in Europe (OSCE) to organize a conference in Geneva to examine issues of population movements in the Commonwealth of Independent States, and devoted particular attention to irregular migration.[37] In June 1996, in collaboration with the European Union, ILO held a conference in Vienna to help design common instruments to combat trafficking in women in Europe. ILO also prepared the Declaration and Agenda for Action adopted by the World Congress Against Commercial Exploitation of Children held in Stockholm in August 1996. The Congress included representatives of 122 countries, as well as numerous NGOs.

177. In 1998 the International Programme on the Elimination of Child Labour (IPEC) of ILO compiled an analysis on child trafficking in eight Asian countries. Following that initial study, IPEC has been actively involved in action against child trafficking both at the national level and subregional levels. In 1998, at the national level, IPEC established the National Plan of Action against Trafficking in Children and their Commercial Sexual Exploitation in Nepal.[38] At the subregional level, IPEC proposed the Framework for Action, "Trafficking in Children for Labour Exploitation in the Mekong Subregion", at a consultation held in Bangkok. The Framework for Action includes prostitution as a form of labour exploitation.[39]

178. Kathleen Barry has addressed the global proliferation of prostitution and the increase in trafficking in women, and believes that trafficking and prostitution are perpetuated by international sex industries. In 1991, Ms. Barry (in collaboration with Wassyla Tamzali of the United Nations Educational, Scientific and Cultural Organization developed the proposed convention against sexual exploitation:

> "The proposed Convention would require States Parties to take all appropriate measures to provide victims of sexual exploitation, including prostitution and traffic in women, with refuge and protection and to repatriate those who desire to be repatriated. Employers who sexually exploit women in the migrating process will be held criminally liable."[40]

179. Because sexually exploited women often lack proof of their citizenship or are stateless when they finally escape their exploiters, and because stateless persons are often not recognized by the new country in which they find themselves, the proposed convention provides that: "refugee status shall be granted to all victims of sexual exploitation, whether they have entered the country legally or illegally".[41] The proposed article 2 specifically states that trafficking is a form of sexual exploitation.[42]

180. The Working Group on Contemporary Forms of Slavery of the Sub-Commission has recognized the variety of circumstances in which trafficking occurs, adopting at its twenty-second session in 1998 a recommendation dealing with "Prevention of the transborder traffic in women and girls for sexual exploitation". In that recommendation, which became section II of resolution 1998/19, the Sub-Commission explicitly declared that "transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights", citing the various conventions against slavery and forced labour as well as many other instruments. The Working Group held an NGO Consultation on Trafficking, Prostitution and the Global Sex Industry from 21 to 23 June 1999, followed by the twenty-third session of the Working Group which made recommendations on these issues to the fifty-first session of the Sub-Commission.[43]

181. At its fifty-first session in 1999 the Sub-Commission approved the Working Group's recommendations with regard to trafficking in persons and, in resolution 1999/17, encouraged Governments to develop national plans of action in accordance with the 1996 Programme of Action for the Prevention of the Traffic in Persons and the Exploitation of the Prostitution of Others (E/CN.4/Sub.2/1995/28/Add.1) and thereby to ensure the coordination of laws to prevent trafficking and the exploitation of prostitution as well as to empower victims and survivors of such practices.

182. A further development in this regard was the approval by the Commission on Human Rights and subsequent adoption by the General Assembly in 2000 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography.

183. On 15 November 2000 the General Assembly adopted the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention (Trafficking Protocol). On 15 December 2000 close to 80 States signed that Protocol. The Convention, which had 189 signatories as of 15 December 2000, will enter into force upon ratification by 40 States.

184. The Trafficking Protocol includes provisions designed to protect and assist victims of trafficking in persons. These provisions appear in articles 6 and 7.

185. Article 6 requires States parties to ensure that victims of trafficking are provided with information on relevant court and administrative proceedings and assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.

186. Article 6 also requires States parties to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking. Such measures include appropriate housing; counselling and information, in particular as regards their legal rights; medical, psychological and material assistance; and employment, educational, and training opportunities.

187. In addition, article 6 requires States parties to endeavour to provide for the physical safety of victims of trafficking while they are within their respective territories and to ensure that their respective domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.

188. Article 7 requires States parties to consider adopting legislative or other appropriate measures that permit victims of trafficking to remain in their respective territories, temporarily or permanently, and in doing so to give appropriate consideration to humanitarian and compassionate factors.

D. The right to leave and return

189. Article 13 of the Universal Declaration of Human Rights sets forth the basic right to freedom of movement, and does not distinguish between citizens and non-citizens. Article 13 states that: "[e]veryone has the right to freedom of movement and residence within the borders of each State" and that "[e]veryone has the right to leave any country, including his own, and to return to his country".

190. Similar provisions are set forth in the International Covenant on Civil and Political Rights, although the Covenant appears to draw a distinction between documented and undocumented aliens. Article 12 states:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> "2. Everyone shall be free to leave any country, including his own ...
>
> " ...
>
> "4. No one shall be arbitrarily deprived of the right to enter his own country."

191. Regional instruments contain similar provisions regarding the freedom of movement. The African Charter on Human and Peoples' Rights provides for the freedom of movement within the borders of a State where an individual lawfully resides (art. 12, para. 1) and the general right to leave and return (art. 12, para. 2). Non-nationals may only be deported in accordance with law (art. 12, para. 4) and mass expulsions of non-citizens are prohibited (art. 12, para. 5).

192. While most human rights instruments address freedom of movement in a single article or even more tangentially, two declarations address the issue in a more comprehensive fashion: the Declaration on the Right to Leave and the Right to Return, adopted by a colloquium held in Uppsala, Sweden, in 1972, and the Strasbourg Declaration on the Right to Leave and Return, adopted by a meeting of experts held in 1986.

193. More recently, Mr. Volodymyr Boutkevitch prepared a working paper on the right to freedom of movement and related issues in implementation of decision 1996/109 of the Sub-Commission (E/CN.4/Sub.2/1997/22). Mr. Boutkevitch's working paper discussed the right to freedom of movement and related issues in international legal instruments, the right to freedom of movement at the national level, and the state of freedom of movement in the last 10 years.

VI. DEVELOPING FURTHER HUMAN RIGHTS STANDARDS AND IMPLEMENTATION PROCEDURES IN REGARD TO NON-CITIZENS: TENTATIVE CONCLUSIONS AND RECOMMENDATIONS

194. Continued discriminatory practices against non-citizens demonstrate the lack of standards adopted and particularly implemented by States regarding the rights of individuals who are not citizens of the country in which they live.

195. States should be encouraged to abide by the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

196. States that have not already done so should be encouraged to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

197. CERD should consider how to interpret article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Discrimination, so as to avoid diminishing the protections for non-citizens under other human rights treaties and within the Convention itself. CERD should be encouraged to prepare a general recommendation on the rights of non-citizens. At a later stage in this study the Sub-Commission might, in cooperation with CERD, help formulate such a general recommendation.

198. CERD is correct in noting that "distinctions are being made between different categories of non-citizens" (E/CN.4/Sub.2/1997/31, annex, p. 4) and that "these distinctions may amount to total exclusion of persons, depriving them of the most fundamental rights and having racist implications", (ibid.) Such distinctions raise questions from the perspective of the Convention, in spite of article 2, paragraph 1, and this subject deserves further study in light of recent developments.

199. CERD should consider expressly articulating the rights of individuals who are not citizens of the country in which they live and to make more explicit the incorporation of protections for non-citizens.

200. The Human Rights Committee has recognized the full rights of non-citizens under the Covenant in its General Comment 15 on the position of aliens under the Covenant. Because aliens tend to be of a minority race, discrimination against aliens has some of the same underlying tendencies as racism, and there is a substantial relationship between discrimination on the basis of race and discrimination against aliens. Therefore, it is desirable for CERD to coordinate its work with the substance of General Comment 15 and other efforts of the Human Rights Committee to protect the rights of non-citizens. For example, a new general recommendation on the rights of non-citizens should take into account the terms of the Convention, the experience of CERD in reviewing States parties' reports and the experience of the Human Rights Committee, as well as other sources of relevant jurisprudence such as that of other treaty bodies and the European Court of Human Rights. Further research needs to be devoted to gathering and analysing those experiences and relevant jurisprudence.

201. Other treaty bodies should be encouraged to prepare general comments/recommendations so as to establish a consistent, structured approach to the protection of the rights of non-citizens.

202. States should be encouraged to incorporate international standards in the elaboration of national legislation, policies, and practices.

203. The rights of non-citizens should be explicitly addressed at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

204. Any approach to combating discrimination against non-citizens should take into account several critical factors including different categories of non-citizens (e.g. permanent residents, temporary residents, undocumented aliens, etc.) regarding different categories of rights (e.g. political rights, civil rights, right to education, social security, other economic rights, etc.) in countries of different levels of development and offering differing rationales for such distinctions (e.g. issues of national reciprocity).

205. For example, it is clear that all persons, regardless of citizenship status, enjoy the most fundamental human rights such as the right to life, the right to be free from torture, and the right to be free from arbitrary detention.

206. What is less clear is how various categories of non-citizen status affect other rights such as the right to social security, the right to employment, and the right to higher education.

207. One component of the next stages of this study will be to examine this question in greater detail and to delineate from existing standards and jurisprudence the extent to which various rights apply to various categories of non-citizens.

208. Another aspect of this study will be to cooperate with the International Organization for Migration, the Office of the United Nations High Commissioner for Refugees and other interested organizations in seeking information about and discussing how non-citizens are actually treated in a number of countries and in developing a comprehensive approach to the protection of the rights of non-citizens.

Notes

[1] See CERD/C/SR.1189 (1997).

[2] E/CN.4/Sub.2/1997/31, annex (1997).

[3] E/CN.4/Sub.2/1999/7 and Add.1 (1999).

[4] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10 and corrigenda* (A/54/10 and Corr.1 and 2), chap. IV, sect. E.

[5] The general recommendations/comments of the treaty bodies are compiled in document HRI/GEN/1, which is revised periodically.

[6] Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, 1984, p. 3.

[7] Ibid., p. 46.

[8] Article 12, paragraph 3, of the Covenant states that the right to freedom of movement "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

[9] Most of the provisions in Part III of the Covenant refer specifically to "the right of *everyone*" (emphasis added). For a more thorough treatment of non-nationals under the International Covenant on Economic, Social and Cultural Rights, see John A. Dent, research paper on the social and economic rights of non-nationals in Europe, 1998 (commissioned by the European Council on Refugees and Exiles).

[10] See also the Convention on the Nationality of Married Women, adopted by General Assembly resolution 1040 (XI) of 29 January 1957.

[11] For an in-depth examination of reception standards for asylum-seekers in the European Union, see Office of the United Nations High Commissioner for Refugees, Reception Standards for Asylum-Seekers in the European Union, UNHCR, Geneva, July 2000.

[12] Council resolution 1789 (LIV) of 18 May 1973. See also Ryszard Cholewinski, *Migrant Workers in International Human Rights Law*, 1997.

[13] *Exploitation of Labour through Illicit and Clandestine Trafficking*, United Nations publication, Sales No. E.86.XIV.1. See also Cholewinski, *ibid.*

[14] Baroness Elles, *International Provisions Protecting the Human Rights of Non-Citizens*, United Nations publication, Sales No. E.80.XIV.2.

[15] Exclusion, Equality Before the Law and Non-Discrimination. Proceedings of a seminar organized by the Secretariat General of the Council of Europe in cooperation with the International Center for Sociological, Criminal and Penitential Research and Studies (INTERCENTER) of Messina, Italy (Taormina Mare, Italy, 29 September-1 October 1994), p. 135. Also published in French under the title *Exclusion, égalité devant la loi et non-discrimination*.

[16] In addition, "customary international law provides evidence that States are free to restrict the political activity of aliens". See *infra* note 17.

[17] See *supra* note 15.

[18] See European Convention on Nationality, ETS No. 166, Strasbourg, 6 November 1997, but see also Protocol No. 4 to the European Convention on Human Rights, article 4 ("Collective expulsion of aliens is prohibited.").

[19] *Berrehab v. the Netherlands*, Series A, No. 138, 21 June 1988.

[20] European Social Charter, appendix, para. 1.

[21] All dealing with the protection of minorities and their integration into society.

[22] In which the Committee of Ministers recommended that Governments of member States adopt explicit policies on community relations questions and ensure that they are put into practice across the whole range of government action, it being understood that such policies should be based on the following principles:

(a) Security of residence for lawful migrants, especially those who have lived in the host country for many years;

(b) Determined action to bring about real equality of opportunity, especially in the fields of training, employment and housing, and to combat all forms of discrimination;

(c) The taking of effective measures to combat racism and xenophobia, including both well-designed measures in the fields of information and education and the enactment of appropriate legislation;

(d) The encouragement of the fullest possible participation of migrants and persons of immigrant origin in the life of the society of the country in which they live;

(e) An attitude of openness towards the cultures and customs brought by migrants insofar as they are compatible with national law.

[23] Dealing with the prevention and amelioration of racism and xenophobia in Europe.

[24] Ibid.

[25] Dealing with the rights and integration of national minorities.

[26] Asbjörn Eide has thoroughly examined this treaty and the right to a nationality in his article "Citizenship and international law with specific reference to human rights law: status, evolution and challenges". Eide includes a history of the concept of citizenship and its development over time, and also attempts to answer the question: "What are the rights of a given individual in regard to the country in which he or she lives?"

[27] Inter-American Court of Human Rights, Advisory Opinion OC 4/84 of 19 January 1984.

[28] See V. Demleitner, "The Fallacy of Social 'Citizenship', or the Threat of Exclusion", *Georgia Immigration Law Journal*, vol. 12 (1997), pp. 35, 59.

[29] See North American Free Trade Agreement, 8 December 1993, United States-Canada-Mexico, chap. 16, art. 1603, para.1.

[30] See *supra* note 14, para. 293.

[31] Asbjörn Eide, "Study on the achievements made and obstacles encountered during the decades to combat racism and racial discrimination" (E/CN.4/Sub.2/1989/8), para. 370.

[32] Human Rights Committee, General Comment 15, para. 1 (citing the International Covenant on Civil and Political Rights, art. 2, para. 1).

[33] See *supra* note 14, para. 366 (1).

[34] Ibid. para. 366 (20).

[35] Kathleen Barry, *The Prostitution of Sexuality*, 1995, p. 165.

[36] Ibid., p. 195. "Local prostitution in Paris and in major cities throughout the world is interconnected with the traffic in women." "In 1992 it was estimated that 85 per cent of the prostitutes in the [Bois de Boulogne] were illegal immigrants ... In recent years immigrant prostitution in France has been increasingly trafficked from South America, particularly Brazil, Ecuador, Peru and Colombia."

[37] See Bimal Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration*, 1998, p. 134.

[38] IPEC-ILO, Fighting child trafficking at national level, action in Nepal. See www.ilo.org/public/english/90ipec/publ/expls-98/examp113.htm.

[39] "Trafficking in Children for Labour Exploitation in the Mekong Subregion: A Framework for Action". Section 4 - The ILO-IPEC Programme Strategy to Combat Trafficking in Children for Labour Exploitation, including Child Prostitution. See www.ilo.org/public/english/90ipec/publ/traffic.htm.

[40] See *supra* note 35, p. 307.

[41] Ibid., pp. 307, 308.

[42] Ibid., appendix: Proposed Convention against Sexual Exploitation, January 1994.

[43] The recommendations of the NGO Consultation can be found in annex II to the report of the Working Group on Contemporary Forms of Slavery on its twenty-fourth session. (E/CN.4/Sub.2/1999/17).

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PREVENTION OF DISCRIMINATION AND PROTECTION OF INDIGENOUS PEOPLES AND MINORITIES

The rights of non-citizens

Preliminary report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103

Addendum

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I. INTRODUCTION

1. This addendum contains brief summaries of the various jurisprudence and concluding observations upon which the main section of the preliminary report (E/CN.4/Sub.2/2001/20) is based.

II. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD)

A. CERD jurisprudence

2. CERD has adopted the following views on the rights of non-citizens, reflecting its mandate under article 14 of the Convention on the Elimination of All Forms of Racial Discrimination to consider communications.

3. At its fifty-fourth session in 1999 CERD considered *Zaid Ben Ahmed Habassi v. Denmark*.[1] The communication involved the refusal of a loan by a Danish bank on the sole ground of the author's non-Danish nationality. The author, a citizen of Tunisia, was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. A complaint was made with local authorities but an investigation into the incident was discontinued after a finding that the nationality requirement was a legitimate method of ensuring repayment. The communication alleged that Denmark violated article 2 (d) by not adequately investigating his claim of racial discrimination. It was the opinion of the Committee that nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place of his employment and property, or family ties, are more relevant in this context as citizens may live abroad and thus have few territorial ties to their State of citizenship. CERD therefore held that in such situations States parties to the International Convention on the Elimination of All Forms of Racial Discrimination are obliged to conduct a thorough investigation in order to determine whether racial discrimination was a motivating factor.[2]

4. At the same session, CERD considered *B.M.S. v. Australia*[3] in which an Indian national and medical doctor complained that Australia's quota system, by which it limited the number of licensed non-citizen medical doctors, violated article 5 (e) (i) of the Race Convention, namely the right to work and free choice of employment. CERD concluded that such professional licensing schemes did not violate the Convention as long as they applied to all foreign medical doctors regardless of race or national origin.[4]

B. CERD concluding observations

5. CERD has also reflected its continuing concern about various forms of discrimination against non-citizens in its consideration of several States parties' reports. In doing so, CERD has made concluding observations and comments on the rights of non-citizens with regard to numerous countries, reflecting its mandate under the Convention to address discrimination against non-citizens.

6. For example, in examining the report of Croatia[5] at its forty-second session in 1993, CERD "noted with concern the general lack of clarity in a number of basic legal provisions guaranteeing non-discrimination in the enjoyment of human rights and fundamental freedoms for members of the minority communities," noting that "[i]n some cases, guarantees would appear to apply only to citizens of Croatia."[6] The Committee expressly noted that article 14 of the Croatian Constitution prohibiting racial discrimination and article 35 guaranteeing fundamental freedoms appeared to apply only to Croatian citizens.[7]

7. In examining the report of the Republic of Korea[8] at its forty-third session in 1993, CERD "sought clarification on matters relating to naturalization and the rights to inheritance of naturalized citizens; foreigners' eligibility to join or create trade unions and enjoy the benefit of their protection; the level of wages received by foreign workers; and foreign workers' enjoyment of the rights to medical and other social services."[9] The government representative informed CERD that "naturalized citizens benefited from the same rights and had the same obligations as other citizens" and that "foreign workers had the same rights as workers who were nationals of the country, provided that they were legally registered for work."[10] In its concluding observations on the report, however, the Committee expressed its concern "at the reported discrimination suffered by spouses and children of foreign workers."[11]

8. During its examination at the same session of the report of Kuwait,[12] CERD, recalling that "States parties were under an obligation to report fully on legislative measures relating to foreigners and their implementation,"[13] asked for more precise information on the current situation of certain categories of persons, and in particular Bedouins and Palestinians, who were reported to be in a very vulnerable position. According to reports from various sources, Bedouins, Palestinians, Iraqis, and citizens of other countries that had not participated in the coalition against Iraq had been dismissed from public employment; excluded from the public school system; and subjected to ill-treatment, detention, expulsion, and torture. In addition, CERD expressed concern that domestic staff of Asian origin "were subjected to debt bondage, other illegal employment practices, passport deprivation, illegal confinement, rape and physical assault."[14] The Committee recommended that Kuwait should "take steps to guarantee the enjoyment by individuals belonging to vulnerable groups of foreigners, including foreign domestic servants, of the rights enshrined in the Convention without any discrimination."[15]

9. At its forty-second session in 1993, CERD examined the report of Qatar.[16] With respect to article 2 of the Convention, CERD inquired whether article 9 of the Constitution of Qatar, which guaranteed equality of all individuals in regard to their rights and obligations, also applied to non-citizens; whether non-Arabs were able to acquire Qatar nationality; whether foreign workers were discriminated against; and whether the Government intended to adopt legislation prohibiting discrimination against foreign workers. With respect to article 5 of the Convention, CERD expressed concern about "whether free choice of employment was guaranteed to foreigners, whether foreign workers had access to all professions and trades, whether the Government envisaged measures to eliminate differences between citizens and foreign workers concerning access to all trades, whether non-citizens were eligible to receive social security benefits, and whether freedom to leave the country and return was guaranteed to non-citizens."[17] CERD explicitly noted that "legislation restricting non-Arab lawyers from pleading a case before the courts was discriminatory."[18]

10. In examining the report of Nigeria,[19] CERD inquired into the rights and guarantees of non-citizens under the Nigerian Constitution and why a distinction was made in national legislation between citizens of Nigeria by birth and other Nigerians. CERD emphasized that under article 5 of the Convention, States "had an obligation to guarantee the civil, political, economic, social and cultural rights of the whole population and not just of citizens."[20] Furthermore, CERD "recommended that national legislation be brought into full compliance with the provisions of the Convention, in particular regarding ... the effective enjoyment of the rights set forth in article 5."[21]

11. CERD examined subsequent reports of Nigeria[22] at its forty-seventh session in 1995. In connection with article 1 of the Convention, CERD "noted that section 39 (1) of the 1979 Nigerian Constitution provided for the protection of citizens against discrimination, but did not cover non-citizens or provide protection against discriminatory actions or practices outside the governmental sector."[23]

12. CERD examined the report of Italy[24] at its forty-sixth session in 1995. Regarding article 5 of the Convention, CERD expressed concern that legislation concerning political asylum for non-European Union citizens might be "more restrictive in matters relating to the status and employment of the people concerned than the ordinary Italian legislation in those areas."[25] CERD also expressed concerns "about some cases involving the ill-treatment of foreigners of non-[European] Community origin by police officers and prison staff."[26]

13. CERD considered the report of the United Arab Emirates[27] at its forty-seventh session in 1995. With respect to article 5 of the Convention, CERD "asked to what extent foreign workers ... were entitled to have their children join them and to have them educated in their own language, and whether those children were free to practise their religion."[28] CERD also inquired into the content of bilateral agreements between the United Arab Emirates and other countries regarding the status of foreign workers. Members of CERD "expressed their deep concern at information from various sources that foreign workers, particularly women from Asian countries, were subjected to inhuman treatment."[29] CERD also asked whether aliens living in the United Arab Emirates had the right to assemble freely and practise their culture. CERD recommended that the United Arab Emirates "show the utmost diligence in preventing acts of ill-treatment being committed against foreign workers, especially foreign women domestic servants, and take all appropriate measures to ensure that they are not subjected to any racial discrimination."[30]

14. At its fifty-fifth session in 1999, CERD considered the reports of Azerbaijan[31] and noted that Azerbaijan had been engaged in a conflict with Armenia since 1991, resulting in a large refugee population. Because of the occupation of some 20 per cent of its territory, Azerbaijan stated that it could not fully implement the Convention.[32] Although CERD noted that Azerbaijan's Constitution guarantees the enjoyment, without discrimination, of most of the rights mentioned in article 5 of the Convention, it expressed "acute concern about the effective enjoyment of these rights by persons belonging to ethnic groups, in particular by persons belonging to Armenian, Russian, and Kurdish minorities when seeking employment, housing, and education."[33] The Committee recommended that Azerbaijan take additional steps to implement article 6 of the Convention by facilitating equal access to the courts and administrative bodies for all persons belonging to ethnic minorities.[34] CERD requested that

Azerbaijan include in its next report appropriate extracts from the Law on Citizenship so that the Committee could consider whether it conforms with the Convention.[35] Further, the Committee recommended that Azerbaijan utilize all available means, including international cooperation, to address the situation of displaced persons and refugees, especially regarding their access to education, housing, and employment.[36]

15. CERD considered the report of Chile[37] at its fifty-fifth session in 1999. The Committee welcomed efforts towards reform of domestic legislation, including a draft reform of the Penal Code then under discussion in the Congress designed to penalize acts of discrimination on grounds of race or national or ethnic origin.[38] The Committee expressed concern regarding the situation of migrant workers, in particular those of Peruvian nationality, and requested that Chile include detailed information in its next report on their situation and the implementation of articles 4 and 5 of the Convention.[39] CERD expressed concern about research that showed a "considerable part of the Chilean population demonstrates intolerant and racist tendencies."[40] It recommended that Chile use all effective means to "raise the awareness of its people about the rights of indigenous peoples and national or ethnic minorities."[41]

16. At the same session, CERD considered the report of the Dominican Republic.[42] The Committee expressed concern regarding "the situation of a large number of Haitians living in the country, the majority of them illegally, in view of the information that they, and in particular women and children, are often unable to enjoy the most basic economic and social rights, such as housing, education, and health services."[43] CERD recommended that the Dominican Republic take urgent measures to ensure the enjoyment by persons of Haitian origin of their economic, social, and cultural rights without discrimination.[44]

17. In considering the report of Guinea[45] at the same session, CERD noted that the influx of a large number of refugees from Sierra Leone, Liberia, and Guinea-Bissau had impeded the full implementation of the Convention.[46] The Committee noted with appreciation Guinea's willingness to receive over 1 million refugees and asylum-seekers from neighbouring countries, and that domestic legislation provides for the protection and asylum of refugees fleeing their countries because of racial or ethnic discrimination.[47] While noting that Guinea's Constitution establishes the principle of equality and that domestic legislation criminalizes acts of racial discrimination, the Committee expressed concern at the lack of information on the implementation of articles 2, 4, and 5 of the Convention.[48] Specifically, CERD expressed concern at the destruction by Guinea of many homes in the Conakry Ratoma neighbourhood, belonging mainly to members of the Puhlar ethnic group, which resulted in riots and continuing inter-ethnic tension in that area.[49] The Committee requested that Guinea submit a report on the situation in Conakry Ratoma and the measures taken to address inter-ethnic tension in the area and compensate persons whose property was expropriated.[50] CERD recommended that Guinea include in its next report "the text of the Law on Citizenship for the Committee to evaluate the limitations on foreigners and stateless persons on the enjoyment of the rights enshrined in article 5 of the Convention."[51]

18. CERD considered the report of Haiti[52] at its fifty-fifth session in 1999. The Committee expressed concern at the lack of domestic legislation to prevent acts of discrimination by individuals in implementation of articles 2 (1) (d) and 5 (e) of the Convention.[53] CERD

recommended that Haiti include in its next report information on restrictions upon foreigners of different racial or ethnic origin and upon non-native Haitians, with respect to the enjoyment of the rights enshrined in article 5 of the Convention.[54]

19. In 2000 CERD considered the combined initial, second, third, and fourth periodic reports of Estonia.[55] In doing so, CERD expressed concern that the definition of national minorities contained in Estonia's 1993 National Minorities Cultural Autonomy Act only applies to Estonian citizens.[56] In light of the significant number of non-nationals and stateless persons residing in the territory of the State party, CERD was concerned that such a restrictive and narrow definition may limit the scope of Estonia's State Programme on Integration, by which it aimed to encourage the integration of different nationalities residing within its territory.[57]

20. In the same concluding observations with regard to Estonia, CERD expressed particular concern that the provisions for restricted immigration quotas established by the 1993 Aliens Act apply to citizens of most countries in the world, except those of the European Union, Norway, Iceland, and Switzerland.[58] CERD recommended that the quota system be applied without discrimination based on race or ethnic or national origin.[59]

21. In considering the fourteenth periodic report of Denmark in 2000,[60] CERD noted that the new Act on Integration of Aliens transfers the responsibility for integration from the central to the local authorities. CERD recommended that Denmark monitor closely the implementation of the new Act with a view to ensuring that the geographical distribution of aliens within the State party is made according to the principle of equity and does not lead to violation of their rights recognized under the Convention.[61]

22. Also in 2000, CERD considered the combined second, third, and fourth periodic reports of Zimbabwe.[62] In doing so, the Committee noted with concern the insufficient information provided on the situation of refugees, migrants, and non-nationals residing in Zimbabwe.[63] Additionally, it noted with dissatisfaction that the laws concerning citizenship give preference to non-national female spouses over non-national male spouses of nationals of Zimbabwe.[64] It recommended that the State party review its citizenship laws to ensure non-discrimination.[65]

23. In considering the combined twelfth, thirteenth, and fourteenth periodic reports of France,[66] also in 2000, CERD expressed concern about possible discrimination in the implementation of laws providing for the removal of foreigners from French territory, including persons in possession of valid visas.[67]

III. HUMAN RIGHTS COMMITTEE

A. Human Rights Committee jurisprudence

24. The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, has adopted the following views on the rights of non-citizens, reflecting its mandate under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights to consider communications submitted to it.

25. For example, in 1981, the Human Rights Committee considered a communication, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius*[68] in which a Mauritian woman alleged that Mauritius immigration law discriminated against women in violation of articles 2 (1) and 3 of the Covenant on Civil and Political Rights.[69] The Government of Mauritius adopted an immigration law which provided that if a Mauritian woman married a man from another country, the husband must apply for residence in Mauritius and that permission may be refused.[70] If, however, a Mauritian man married a foreign woman, the foreign woman was entitled automatically to residence in Mauritius.[71] The Human Rights Committee did not hold that foreigners have a right to enter or reside in Mauritius. Nonetheless, the Committee held that Mauritius had violated the Covenant by discriminating between men and women without adequate justification.[72] The law also violated the right of the family to live together.[73]

26. At its twenty-seventh session in 1986, the Human Rights Committee considered a communication, *Eric Hammel v. Madagascar*,[74] in which a French national alleged that his arrest and subsequent expulsion violated the International Covenant on Civil and Political Rights because he had no opportunity to avail himself of any of the remedies of appeal against expulsion that are provided by law.[75] Madagascar denied the alleged violation of article 13 of the Covenant arguing that expulsion may be ordered "if the residence of the alien in Madagascar may give rise to a breach of the peace or threatens public security."[76] The Human Rights Committee adopted the view that there was a violation of article 13, noting that the French citizen "was not given an effective remedy to challenge his expulsion and that the State party has not shown that there were compelling reasons of national security to deprive him of that remedy."[77] The Committee noted that "an alien must be given full facilities for pursuing his remedy against expulsion ... ."[78]

27. At its forty-third session in 1991, the Human Rights Committee considered a communication, *Cañón García v. Ecuador*.[79] A Colombian citizen alleged that his expulsion to the United States violated the International Covenant on Civil and Political Rights because he should have been afforded the procedural safeguards provided in the extradition treaty between the State party and the United States.[80] Upon his arrest, the Colombian citizen was denied access to an attorney or the Colombian Consul, and instead was flown immediately to the United States. In adopting the view that Ecuador had violated articles 7, 9, and 13 of the Covenant, the Human Rights Committee noted that Ecuador conceded that the author's removal from its jurisdiction suffered from irregularities and that it was conducting an ongoing investigation into the matter.[81]

28. At its forty-ninth session in 1993, the Human Rights Committee considered a communication, *Chitat Ng v. Canada*.[82] The author of the communication, a British subject, complained that his extradition to the United States on capital charges violated Canadian obligations under article 6 of the International Covenant on Civil and Political Rights. The Committee noted that if a State party extradites a person within its jurisdiction "in such circumstances that as a result there is a real risk that his or her rights under the Covenant will be violated under another jurisdiction, the State party itself may be in violation of the Covenant."[83] The Human Rights Committee, however, adopted the view that the Covenant does not necessarily require Canada to refuse to extradite a non-national who may face the death penalty.[84]

29. At its fifty-first session in 1994, the Human Rights Committee considered a communication, *Celepli v. Sweden*.[85] A Turkish citizen alleged that a Swedish decision to expel him, or, alternatively, to subject him to residence restrictions, was discriminatory.[86] Sweden contended that suspicions of the Turkish citizen's involvement in terrorist activities invoked compelling reasons of national security to restrict his freedom of movement without providing a possibility of appeal.[87] The Committee adopted the view that, bearing in mind that the State party had invoked reasons of national security, the restrictions to which the Turkish national was subjected were compatible with the Covenant.[88]

30. At its fifty-seventh session in 1996, the Human Rights Committee considered a communication, *Josef Frank Adam v. The Czech Republic*.[89] The author, an Australian citizen, alleged that Czech legislation providing for restitution excludes non-Czech claimants and therefore entails discrimination in violation of article 26 of the International Covenant on Civil and Political Rights.[90] The Committee first reiterated "its jurisprudence that not all differentiation of treatment can be deemed discriminatory under article 26."[91] The Human Rights Committee adopted the view that since the State party itself is responsible for the author's lack of Czech citizenship, however, "it would be incompatible with the Covenant to require [the author] to obtain Czech citizenship as a prerequisite for the restitution of [his] property."[92]

31. At its fifty-ninth session in 1997, the Human Rights Committee considered a communication, *A v. Australia*.[93] The author, a Cambodian citizen, contended that Australia's immigration law was discriminatory in its treatment of non-nationals in that it differentiated with regard to treatment between those immigrants who arrived by boat and those who arrived by another means.[94] The author further alleged that he was deprived of his right to equality before the court when he was deprived of effective access to legal advice.[95] The State party first submitted that the quality of "'boat person' cannot be approximated to 'other status'" within the meaning of illegal discrimination under article 2 of the International Covenant on Civil and Political Rights.[96] The State party further submitted that "no argument can be made that there was a breach of the author's right to equality before the courts [concerning legal advice and representation]: ... he was not subject to any discrimination on the grounds that he was an alien."[97] The Human Rights Committee adopted its view without making a decision on the first allegation and noted that, as a factual matter, the author was not denied effective access to legal advice.[98]

32. At its sixty-first session in 1997, the Human Rights Committee considered a communication, *Mrs. G.T. v. Australia*.[99] The author of the communication alleged that Australia's decision to deport her Malaysian husband to Malaysia where he might be subject to the death penalty under the Malaysian Dangerous Drugs Act would violate his right to life.[100] The State party submitted that expulsion is distinguishable from extradition in that the very purpose of extradition is to return the person for prosecution, whereas no such necessary link exists between expulsion and possible prosecution of a non-national.[101] In deciding that Australia did not violate any of the author's husband's rights, the Human Rights Committee adopted the view that the author had failed to substantiate the claim that there was a real risk that her husband would be charged at all if he were returned to Malaysia.[102] The Committee, however, held that if a State party deports a person within its territory and subject to its

jurisdiction in such circumstances that, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

33. At its sixty-eighth session in 2000 the Human Rights Committee considered *Zouhair Ben Said v. Norway*[103] in which a Tunisian citizen, who at the time was not residing in Norway, claimed he was denied his right to a fair trial guaranteed by article 14, paragraph 1, of the Covenant because he was denied entry into Norway in order to attend a court hearing at the Oslo City Court regarding a child custody and visitation rights case. The Committee found that in such situations the State party is under an obligation under article 14 of the Covenant to allow an individual to be present at the hearing, even if the person is a non-resident alien.[104] In this particular case, however, the Committee did not find a violation of the Covenant as the petitioner's attorney did not request a postponement of the hearing for the purpose of enabling the petitioner to participate in person.[105]

34. The following communications to the Human Rights Committee were decided on procedural grounds and further demonstrate the types of complaints alleged by aliens under the Optional Protocol to the International Covenant on Civil and Political Rights.

35. For example, at its ninth session in 1980, the Human Rights Committee considered a communication, *Larry James Pinkney v. Canada*,[106] in which a United States citizen alleged that Canadian deportation proceedings were not impartial and therefore in violation of Canada's obligations under article 13 of the International Covenant on Civil and Political Rights.[107] Among other grounds, the Canadian Government objected to the admissibility of this claim because article 13 of the Covenant applies only to "an alien lawfully in the territory of a State party" and Mr. Pinkney was not in Canada lawfully.[108] In adopting its views, the Human Rights Committee considered the communication inadmissible because domestic remedies had not been fully exhausted.[109]

36. In 1981, the Human Rights Committee considered a communication, *Anna Maroufidou v. Sweden*,[110] in which the author of the communication, a Greek citizen, alleged that her expulsion under the Swedish Aliens Act was not in accordance with law, as required under article 13 of the International Covenant on Civil and Political Rights.[111] The Human Rights Committee, in adopting the view that the facts did not disclose any violation of the Covenant, noted that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned, and not within the functions of the Human Rights Committee to review.[112]

37. At its sixteenth session in 1982, the Human Rights Committee considered a communication, *A.M. v. Denmark*,[113] in which a Pakistani national alleged that the decision of Danish authorities to deport him constituted degrading treatment and punishment.[114] The Human Rights Committee decided that the communication was inadmissible because of a Danish reservation in respect of the competence of the Human Rights Committee to consider a communication from an individual when the matter has already been considered under other procedures of international investigation, in this case the European Commission on Human Rights.[115]

38. At its twenty-third session in 1984, the Human Rights Committee considered a communication, *M. F. v. The Netherlands*.[116] The author, a Chilean national, alleged, *inter alia*, that expulsion would deprive him of equality before the law in regard to an appellate hearing concerning the rejection of his claim for asylum.[117] The Committee decided that the facts did not substantiate the author's claim that the Netherlands had breached any obligation; therefore, the communication was inadmissible.[118]

39. At its twenty-ninth session in 1987, the Human Rights Committee considered a communication, *F.G.G. v. The Netherlands*.[119] The author of the communication, a Spanish citizen, alleged discriminatory termination from his employment, and unsuccessfully sought protection from the termination in a civil proceeding. The Netherlands Government observed that "article 26 of the Covenant does entail an obligation to avoid discrimination [between citizens and non-citizens], but that this article can only be invoked ... in the sphere of civil and political rights" whereas the civil proceedings brought in this instance involved rights in the economic and social sphere which was outside the competence of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.[120] The Committee decided that the communication was inadmissible at the time because the author had not exhausted all domestic remedies available.[121]

40. In 1988, the Human Rights Committee considered a communication, *V.M.R.B. v. Canada*.[122] A citizen of El Salvador alleged that "the Canadian Government's manoeuvres constitute discrimination against foreign citizens. An alien may not express his opinions, thoughts or convictions, for in exercising these rights he will not receive the same treatment as a Canadian citizen ... . The alien cannot enjoy the same protection for his opinions as a citizen expressing the same views."[123] In rejecting the communication as inadmissible, the Human Rights Committee noted that "[w]ith respect to articles 2 and 26 of the Covenant, the author has failed to establish how the deportation of an alien on national security grounds constitutes discrimination."[124]

41. At its fiftieth session in 1994, the Human Rights Committee considered a communication, *S.B. v. New Zealand*.[125] The author of the communication, a British subject, claimed that the New Zealand Social Security Act discriminated against foreign immigrants.[126] The Human Rights Committee noted that the legislation applies to all persons receiving benefits pursuant to the Act regardless of nationality and, thus, that the author did not substantiate, for purposes of admissibility, that he was a victim of discrimination.[127]

42. At its fifty-third session in 1995, the Human Rights Committee considered a communication, *Francis Peter Perera v. Australia*.[128] An Australian citizen by naturalization complained that the Australian police discriminated against him on the basis of his race and national origin.[129] In determining that the communication was inadmissible, the Committee noted that it could not examine the allegation of discrimination because the purported events occurred before the entry into force of the Optional Protocol for Australia.[130]

43. At its fifty-eighth session in 1996, the Human Rights Committee considered a communication, *Mrs. Brigette Lang v. Australia*.[131] A German citizen complained that the

Australian courts are biased against immigrants.[132] In determining that the communication was inadmissible, the Committee observed "that the allegations of discrimination and bias on the part of the Australian courts have not been substantiated."[133]

44. At its fifty-sixth session in 1996, the Human Rights Committee considered a communication, *Vladimir Kulomin v. Hungary*.[134] The Committee ultimately decided that there was no substantiation for the author's claim that he had been discriminated against on the basis of his nationality.[135]

45. At its sixty-first session in 1997, the Human Rights Committee considered a communication, *Lazar Kalaba v. Hungary*.[136] An Australian citizen complained that in rejecting his claim for compensation under Act XXXII of 1992 for his internment in the Sárvár concentration camp, Hungary discriminated against him on the basis of his nationality.[137] The Committee decided that the communication was inadmissible at the time because the author had not exhausted all domestic remedies available.[138]

B. Human Rights Committee concluding observations

46. The Human Rights Committee has also adopted a number of concluding observations and comments regarding the rights of non-citizens under the Covenant.

47. In 1994 the Human Rights Committee reviewed the periodic report of Nepal.[139] The Committee adopted a concluding observation in which it, *inter alia*, voiced concern that the Nepalese Constitution apparently provided rights and freedoms only to Nepalese citizens.[140] The Committee stressed that Nepal had an obligation to ensure to all individuals within its jurisdiction the rights and freedoms recognized in the Covenant.[141]

48. In 1995 the Human Rights Committee considered the periodic report of Latvia.[142] The Committee expressed concern regarding the rights of non-citizens and noted that the periodic report did not make it clear how the rights of resident non-citizens were guaranteed in accordance with article 2, paragraph 1, of the Covenant.

49. Also in 1995, the Human Rights Committee issued its concluding observations on the initial report of Estonia.[143] The Committee noted that numerous rights and prerogatives, such as the right to participate in the process of land privatization and the right to occupy certain posts or practise certain occupations, are granted solely to Estonian citizens. The Committee expressed its concern that permanent residents who are non-citizens are thus deprived of a number of rights under the Covenant. The Committee therefore recommended that all provisions in domestic law discriminating against non-citizens be systematically reviewed and brought into line with articles 2 and 26 of the Covenant.

50. In 1995 the Human Rights Committee further considered the periodic report of Estonia.[144] The Committee repeated many of the concerns summarized in the previous paragraph, but it also noted that non-citizen status affects a large population of Russian-speaking permanent residents who are unable to acquire Estonian citizenship due to strict language and other criteria.

51. Regarding the periodic report of Gabon considered in 1996,[145] the Committee expressed concern regarding the rights of non-Gabonese citizens and refugees living in Gabon. The Committee was concerned about legal impediments to their freedom of movement within the country as well as the requirement of an exit visa for foreign workers, which it noted runs counter to the provisions in article 12 of the Covenant. The Committee recommended that existing provisions such as article 1, paragraph 3, of the Gabonese Constitution limiting or restricting the exercise of the right to freedom of movement for non-Gabonese citizens, including the requirement of exit visas, should be reviewed to bring the legislation fully into conformity with article 12 of the Covenant.

52. With regard to the periodic report of Zambia in 1996,[146] the Committee noted with concern that the equality clause in section 11 of the Constitution and the non-discrimination clause in section 23 do not apply to non-citizens and that there are other exemptions in section 23 which are not compatible with articles 2 and 26 of the Covenant.

53. The Committee considered the periodic report of Lithuania in 1997. This consideration resulted in a concluding observation[147] in which the Committee noted that certain rights provided in the Constitution of Lithuania are limited to citizens. In this regard, the Committee recommended that the relevant legislation be reviewed in order to ensure that there is no arbitrary discrimination against aliens since such discrimination is incompatible with the provisions of articles 2 (1) and 26 of the Covenant.

54. In 1998 the Human Rights Committee issued its concluding observation on the report of Israel.[148] The Committee regretted that the Israeli authorities appeared to be placing obstacles in the way of family reunion in the case of marriages between an Israeli citizen and a non-citizen who is not Jewish (and therefore not entitled to enter under the Law of Return). These obstacles, which include long waiting periods for entry permits, a "probation" period of over five years' residence to establish that the marriage is genuine, and a further waiting period for citizenship, the Committee noted, are applied even more rigorously in the case of Arab citizens, particularly those who marry persons resident in the occupied territories. The Committee considered such obstacles to be incompatible with articles 17 and 23 of the Covenant. It recommended that the Government reconsider its policies with a view to facilitating family reunion of all citizens and permanent residents.

55. In considering the periodic report of Japan[149] that same year, the Committee expressed concern about instances of discrimination against members of the Japanese-Korean minority who are not Japanese citizens, including the non-recognition of Korean schools.[150] The Committee drew attention to its General Comment No. 23 (1994) which stresses that protection under article 27[151] cannot be restricted to citizens.[152]

56. During 1998, in reviewing the report of Armenia,[153] the Committee noted with concern that the Armenian Constitution guaranteed the right to freedom of movement only to citizens. The Committee pointed out that this restriction contravened article 12 of the Covenant.[154]

57. In 1999, the Committee reviewed the fourth periodic report of Mexico[155] and expressed concern at obstacles to the free movement of non-citizens.[156] These obstacles, however, pertained especially to members of non-governmental organizations on human rights fact-finding missions.

58. Also in 1999 the Committee considered the initial periodic report of Cambodia.[157] In doing so, the Committee was concerned that "equality rights" and other provisions of the Cambodian Constitution apply only to "Khmer citizens."[158] The Committee stressed that rights protected by the Covenant are to be enjoyed by all citizens.

59. In 2000 the Human Rights Committee considered the fourth periodic report of Denmark.[159] In doing so, the Committee expressed concern that Immigration Authorities may require DNA examination from immigration applicants and from persons with whom the respective applicant claims the family ties on which a residence permit is to be based.[160] The Committee stressed that DNA testing may have important implications for the right of privacy under article 17 of the Covenant and that Denmark should ensure that such testing is used only when necessary and appropriate to the determination of the family tie on which a residence permit is based.[161]

60. In considering the same periodic report of Denmark, the Committee noted that asylum-seekers in Denmark are often restricted or discouraged from choosing residence in specific municipalities or from moving from one municipality to another.[162] The Committee stated that Denmark should ensure that any such measures, as applied, are in strict compliance with article 12 of the Covenant.[163]

61. Also in 2000, the Committee considered the second periodic report of Gabon[164] and noted that as regard the rights of non-Gabonese citizens and refugees living in Gabon, foreign workers are still required to have exit visas, in contravention of article 12 of the Covenant, and recommended that Gabon do away with that requirement.[165]

IV. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR)

CESCR concluding observations

62. The Committee on Economic, Social and Cultural Rights has considered numerous reports submitted by States parties under articles 16 and 17 of the Covenant regarding its implementation and the situation of non-nationals, including refugees and immigrants.

63. In 1993, after considering the periodic report of Senegal,[166] the Committee noted that foreign workers were barred from holding trade union office and that authorities may unduly restrict their right to strike. The Committee noted further that these restrictions may violate article 8 of the Covenant. The Committee therefore recommended that Senegal amend its national legislation with a view to eliminating those restrictions.

64. In 1994, the Committee on Economic, Social and Cultural Rights considered the periodic report of Austria.[167] The Committee was concerned about the adverse consequences of a then new law on residence and residency permits and the conditions necessary to acquire such permits. The Committee was particularly concerned about how residency permits affect and are affected by housing.

65. In 1995, the Committee on Economic, Social and Cultural Rights considered the periodic report of Ukraine,[168] in which it expressed concern that social services were not adequate to insure a minimum standard of living for the most vulnerable groups, including non-citizens.[169]

66. At its 50th meeting in 1996, the Committee on Economic, Social and Cultural Rights adopted comments regarding the report submitted by the Dominican Republic.[170] The Committee was particularly concerned about the exploitation of Haitians and their unacceptable living conditions.[171] It noted that Haitians live in perpetual insecurity and that they are subject to deportation in inhuman conditions. The Committee recommended that the Dominican Republic "adopt clear legislation on nationality, which would procure legal security to persons of Haitian origin born in the Dominican Republic and to their children; which would require the authorities to register births without discrimination; and which would allow Haitians to obtain Dominican nationality through naturalization under the same conditions as other foreigners."[172]

67. At its 51st meeting in 1996, the Committee on Economic, Social and Cultural Rights adopted concluding observations regarding the report submitted by Finland.[173] The Committee expressed concern at the high level of unemployment among immigrants and refugees, despite recent decreases in the percentage of the general population who are unemployed.[174] It emphasized the need to protect the rights of socially vulnerable groups, including refugees.[175] The Committee expressed concern at reports that the Roma minority had been the subject of discrimination in decisions regarding public housing.[176] The Committee called upon authorities to eliminate discrimination of any kind in exercising the rights of the Covenant, especially the right to housing.[177]

68. The Committee on Economic, Social and Cultural Rights considered the report submitted by Spain[178] and adopted concluding observations at its twenty-second session, held in 1996. The Committee noted "with great concern the growth in the number of acts of discrimination and racism against foreigners in Spain, particularly directed at groups from North Africa, asylum-seekers, illegal workers, and the Romany (Gypsy) population."[179] It urged Spain to take appropriate preventive and penal measures effectively to combat all forms of racial discrimination.[180]

69. At its 53rd meeting in 1997, the Committee on Economic, Social and Cultural Rights considered the report submitted by Iraq.[181] The Committee expressed "concern about reports of discrimination against members of certain minorities, and especially the Kurds, Marsh people, Assyrians, Shi'a Muslims, and Turkomans, with respect to their enjoyment of rights under the Covenant."[182] The Committee noted that the payment of benefits abroad to a citizen of another country will only be ensured if he returns to his country of origin at the end of his insured period of service and this provision precludes workers who leave Iraq before their contract period has expired or who settle in a country other than their country of origin from receiving their

benefits.[183] The Committee recommended that Iraq take measures, in accordance with article 2, paragraph 2, of the Covenant, to guarantee the rights enunciated in the Covenant without discrimination.[184]

70. In 1997, the Committee on Economic, Social and Cultural Rights also considered the report of the Libyan Arab Jamahiriya.[185] The Committee expressed its concern at reports that foreign workers in Libya are living and working in appalling conditions.[186] According to a report of the International Labour Organization (ILO), foreign employees in Libya who are accused of infringing disciplinary rules may be punishable by penalties of imprisonment which can include compulsory labour.[187] According to the same ILO report, Libya also maintains different rates of payment of pensions for foreign and Libyan workers, which the Committee viewed as discriminatory.[188] The Committee also expressed its concern at reports that "during the second half of 1995 thousands of foreign workers were arbitrarily expelled from [Libya] and were not given adequate compensation."[189] It further noted that there was no possibility for a legal or judicial remedy against those expulsions. The Committee recommended that "the status and working conditions of foreign workers be improved and without undue delay, and that these persons be treated with dignity and fully benefit from the rights enumerated in the Covenant."[190] The Committee further recommended that foreign workers who are employed in Libya with valid work permits "should not be deported if they become HIV-positive while in the country."[191]

71. Also in 1997, the Committee on Economic, Social and Cultural Rights considered the report submitted by the United Kingdom of Great Britain and Northern Ireland.[192] The Committee welcomed the "adoption of the Hong Kong Order 1997 which entitles Hong Kong citizens who are not allowed to acquire Chinese nationality to receive United Kingdom citizenship."[193] The Committee adopted the view that "despite the elaborate machinery and legislation for protection against discrimination, there continues to exist to a significant degree ... de facto discrimination against women, Blacks, and other ethnic minorities."[194] It also noted the persistence of a substantially higher rate of unemployment among Blacks, Catholics in Northern Ireland, and other ethnic minorities and their disproportionate numbers in lesser paid jobs.[195]

72. At the eighteenth session in 1998, the Committee on Economic, Social and Cultural Rights considered the report of the Netherlands[196] and noted that a major challenge facing the Government in relation to the implementation of the Covenant is posed by the number of foreign workers in the territory.[197] The Committee observed that racial discrimination exists in labour matters, contributing to some extent to unemployment among immigrants.[198] The Committee encouraged the Netherlands to continue its efforts to eliminate "racial discrimination in the labour market with a view to facilitating the integration of immigrants and their families into the national life."[199]

73. The Committee on Economic, Social and Cultural Rights made concluding observations regarding the report submitted by Nigeria[200] at the same session. The Committee expressed its regret that Nigeria expelled "an estimated half a million Chadian and ... workers [of other nationalities] in inhuman and undignified circumstances, even those among them who had been

legally established for many years with residence permits in Nigeria and had participated in and contributed to the social security system."[201] It noted that the majority of those expelled workers have not been adequately compensated.[202]

74. At the same session, the Committee on Economic, Social and Cultural Rights made concluding observations regarding the report of Poland.[203] The Committee recommended that "the 1962 citizenship law, which discriminates against women by not granting them the same right as men to transmit citizenship to their foreign-born spouses, be abolished."[204]

75. At the same session, the Committee on Economic, Social and Cultural Rights considered the report of Sri Lanka[205] and adopted the view that discrimination in relation to the economic, social and cultural rights of ethnic groups remains the central issue in the armed conflict in Sri Lanka.[206] The Committee expressed "concern that the distinction contained in the current Constitution between 'citizens' and 'other persons' with respect to the right to equality, has not been removed from the proposed revised Constitution [then] before Parliament."[207] The Committee noted with concern the uncertain situation of 85,000 Tamils of Indian origin living in Sri Lanka because "they possess neither Indian nor Sri Lankan citizenship, have no access to basic services such as education, and do not enjoy their economic, social and cultural rights."[208] The Committee welcomed Sri Lanka's plans to award citizenship to the stateless Tamils and requested an update regarding that situation in the next periodic report.[209]

76. At its nineteenth session held in 1998, the Committee on Economic, Social and Cultural Rights adopted concluding observations regarding the report submitted by Canada.[210] The Committee expressed concern regarding "the plight of thousands of 'Convention refugees' in Canada, who cannot be given permanent resident status for a number of reasons, including the lack of identity documents, and who cannot be reunited with their families for a period of five years."[211] The Committee also noted concern that loan programmes for post-secondary education are available only to Canadian citizens and permanent residents. In addition, the Committee noted that refugees and asylum-seekers who do not have permanent residence status are ineligible for those loan programmes.[212] The Committee urged Canada to develop and expand adequate programmes to address the financial obstacles to post-secondary education for low-income students, without any discrimination on the basis of citizenship status.[213]

77. The Committee on Economic, Social and Cultural Rights also considered the report submitted by Cyprus[214] at the nineteenth session. The Committee expressed concern at the continued existence of discrimination between men and women, including inequalities in, among other things, "the transmission of nationality to children and the conferment of refugee status on children (only children of displaced men are so treated)."[215] The Committee recommended that Cyprus abolish such discriminatory laws as soon as possible.

78. The Committee on Economic, Social and Cultural Rights adopted concluding remarks at the same session regarding the report submitted by Germany.[216] The Committee expressed concern about the plight of the Sinti and Roma (Gypsies) in Germany and about their enjoyment of the rights to housing, education, and employment.[217] The Committee called for immediate remedial policies and measures to address discrimination against Gypsies in Germany.[218] The Committee noted that unemployment was particularly high in Germany and that women and

foreigners are most affected.[219] The Committee requested that Germany take immediate measures to address and redress the situation of asylum-seekers, and that refugees be accorded health, economic, and educational rights in accordance with the Covenant.[220]

79. At the same session, the Committee on Economic, Social and Cultural Rights considered the report submitted by Israel.[221] The Committee expressed concern at the widespread discrimination against Arab citizens of Israel, and their exclusion from the enjoyment of their economic, social and cultural rights.[222] The Committee expressed alarm that only half of the workers entitled to the minimum wage actually receive it, and that foreign workers, Palestinians, and "manpower contractor" workers are particularly vulnerable in this regard.[223] The Committee noted with concern that "the Law of Return, which allows any Jew from anywhere in the world to immigrate and thereby virtually automatically enjoy residence and obtain citizenship in Israel, discriminates against Palestinians in the diaspora upon whom the Government of Israel has imposed restrictive requirements which make it almost impossible to return to their land of birth."[224] In order to ensure equality of treatment and non-discrimination, the Committee encouraged Israel to review its laws and bring them into line with the Covenant.[225]

80. At the same session, the Committee on Economic, Social and Cultural Rights considered the report of Switzerland[226] and adopted the view that "despite the existence of legislation providing protection against discrimination, de facto discrimination against women and ethnic minorities continues to exist."[227] The Committee noted the large number of foreigners residing in Switzerland and welcomed the measures taken by the authorities to ensure the enjoyment of their economic, social and cultural rights.[228] The Committee encouraged Switzerland to play a more active role in promoting equal access to higher education for women, immigrants, and ethnic minorities.[229]

81. At its twentieth session in 1999, the Committee on Economic, Social and Cultural Rights addressed the report of Argentina.[230] The Committee welcomed the information that Argentina has signed immigration agreements with Bolivia and Peru in order to regularize the situation of citizens of those countries in Argentina.[231]

82. At the same session, the Committee on Economic, Social and Cultural Rights considered the report submitted by Armenia.[232] The Committee noted with satisfaction the equal treatment of refugees and Armenian citizens in the exercise of economic, social and cultural rights.[233]

83. Also at its twentieth session in 1999, the Committee on Economic, Social and Cultural Rights adopted concluding observations regarding the report submitted by Bulgaria.[234] The Committee "deplored ... the discrimination against the Roma minority in many aspects of life, including education, work, social benefits, and access to land."[235] The Committee was especially concerned about the high rate of unemployment among the Roma minority and the poor quality of education afforded to this group.[236] The Committee noted with regret that Bulgaria does not have any procedure through which minorities can voice complaints about the status of their enjoyment of economic, social and cultural rights.[237] The Committee noted the measures taken to alleviate the situation of asylum-seekers and refugees, such as the adoption of a new law on refugees and the construction of a new centre for asylum-seekers, and urged Bulgaria to implement fully the law reforms.[238]

84. At the same session, the Committee on Economic, Social and Cultural Rights considered the report of Denmark.[239] The Committee acknowledged the social assistance benefits being accorded to refugees, including the provision of temporary housing.[240] The Committee also noted the efforts made by Denmark to integrate foreign workers and their families.[241] The Committee noted with concern an emerging trend of intolerance and violence against minority groups and foreigners, and recommended that Denmark monitor the situation to combat such acts of violence effectively.[242] The Committee recommended that Denmark "carefully monitor the impact of the new Alien Immigration Act and urge[d] it to take urgent remedial action if the legislation proves to have a discriminatory effect upon refugees."[243] The Committee also urged Denmark to take all appropriate measures to reduce the level of unemployment of foreign nationals, immigrants, and refugees.[244]

85. The Committee on Economic, Social and Cultural Rights adopted concluding observations at the same session regarding the report submitted by Iceland.[245] The Committee noted Iceland's intention to amend Act No. 133/1994 on the Right of Foreigners to Work in Iceland in order to eliminate the discrimination currently existing between nationals of European Economic Area (EEA) countries and those of other countries, as well as the discrimination between spouses of nationals of EEA countries and those of non-EEA countries.[246] In recognizing positive aspects, the Committee noted that "persons belonging to EEA countries enjoy the special privilege of obtaining work permits, unemployment benefits and social security benefits for their spouses or children who are non-EEA citizens."[247] In addition, refugees admitted to Iceland not only have the right to obtain work permits but, unlike non-EEA citizens, are not subject to a six-month waiting period before acquiring entitlement to health-care benefits.[248]

86. In considering the report submitted by Ireland[249] at the same session, the Committee welcomed the adoption of the Employment Equality Act of 1998 and the Equal Status Bill of 1998 which aimed at removing several aspects of discrimination, including race, colour, nationality, national or ethnic origin, and membership of the traveller community.[250] The Committee noted with regret that Ireland had not yet ratified the International Convention on the Elimination of All Forms of Racial Discrimination and urged its immediate ratification.[251] It also noted that article 40.1 of the Constitution contains provisions that appear to be inconsistent with the principle of non-discrimination as set out in articles 2 and 3 of the Covenant.[252] The Committee urged Ireland to expedite the enactment of legislation to combat discrimination affecting the traveller community.[253]

87. In 2000 the Committee considered the third periodic report of Portugal.[254] In doing so the Committee expressed its concern about cases of intolerance of and discrimination against Roma people, refugees, and immigrants.[255] The Committee also noted with concern that foreign workers cannot enrol in the vocational guidance and training courses to which Portuguese workers are entitled[256] and therefore urged Portugal to allow foreign workers to enrol.[257]

88. With respect to the fourth periodic report of Finland,[258] also considered in 2000, the Committee recommended that the State party ensure that legislative provisions concerning job security are effectively implemented, especially as regards the most vulnerable groups, including foreigners.[259]

89. In considering the second periodic report of Jordan[260] in 2000 the Committee expressed its concern about discriminatory treatment under the civil law, such as restrictions on the right of Jordanian women married to foreign men to pass on their nationality to their children.[261] The Committee therefore recommended that Jordan incorporate in its legal order the prohibited grounds of discrimination in accordance with article 2 (2) of the Covenant, in particular, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status,[262] and to take all effective legal measures to prohibit discrimination on grounds of sex in all fields of civil, political, economic, social, and cultural life.[263]

V. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW)

CEDAW concluding observations

90. CEDAW has made relevant concluding observations and comments with regard to a number of countries following its examination of their reports submitted in accordance with the Convention on the Elimination of All Forms of Discrimination against Women.

91. In 1994 CEDAW considered the second and third periodic reports of Japan.[264] In doing so, the Committee noted that the report lacked sufficient information regarding women who were non-citizens of Japan and expressed its concern about the sexual exploitation of foreign women.[265] The Committee pointed out that Japan's commitment to the Convention required it to ensure the protection of the full human rights of all women, including foreign and immigrant women.[266]

92. In considering the initial periodic report of Morocco[267] in 1997, CEDAW was concerned that the law relating to the ability to pass on one's nationality benefited the father to the detriment of the mother.[268]

93. In 1997 CEDAW, in considering the initial and second periodic reports of Luxembourg,[269] expressed concern about the fact that no adequate steps had been taken to ensure that the large population of foreign women were able to take advantage of the guarantees under the Convention.[270]

94. CEDAW considered the report of Algeria[271] at its twentieth session in 1999. CEDAW was concerned that mothers in Algeria cannot transmit their nationality to their children in the same way that fathers can.[272] The Committee noted that "citizenship is a fundamental right which men and women must be able to enjoy equally."[273] CEDAW recommended the revision of legislation governing nationality in order to make it more consistent with provisions of the Convention.[274]

95. CEDAW considered the reports of Spain[275] at its twenty-first session in 1999. CEDAW was concerned at the situation of "foreign women workers in domestic service, asylum-seekers and women who may be living clandestinely in Spain."[276] It was concerned that these women may lack adequate protection from violence and abuse.[277] CEDAW recommended that the

situation of these women workers be assessed in greater depth, including the legislative provisions governing their employment, and that Spain take measures to improve the level of literacy, including legal literacy, of these women.[278]

96. In 2000 CEDAW considered the combined second and third periodic reports of Iraq.[279] In doing so, CEDAW expressed concern that Iraq's nationality law does not grant women an independent right to acquire, change, or retain their nationality or to pass it on to their children.[280]

97. Similarly, in examining the first and second periodic reports of Jordan[281] in 2000, CEDAW expressed concern that Jordanian nationality law prevents a Jordanian woman from passing on her nationality to her children if her husband is not Jordanian.[282]

98. Also in 2000 CEDAW considered the combined second and third periodic reports of Germany.[283] CEDAW expressed concern about the often precarious social and economic situation of foreign women living in Germany.[284] CEDAW also expressed concern at the incidence of xenophobic and racist attacks in the State party and noted the vulnerabilities that foreign women can face on the multiple grounds of sex, ethnicity, and race.[285] Noting the Government's intention to commission a study on the living situation and social integration of foreign women and girls, CEDAW requested the Government to undertake a comprehensive assessment of the situation of foreign women, including their access to education and training, work and work-related benefits, health care and social protection, and to provide such information in its next report.[286] CEDAW also recommended that Germany take steps to increase foreign women's awareness about the availability of legal remedies and means of social protection.[287]

VI. COMMITTEE ON THE RIGHTS OF THE CHILD (CRC)

CRC concluding observations

99. The Committee on the Rights of the Child has made concluding observations and comments on the rights of non-citizen children with regard to several countries, reflecting its mandate to foster implementation of the Convention on the Rights of the Child.

100. During its consideration of the initial periodic report of Pakistan in 1994, the Committee noted that national legislation does not appear to ensure that all children, including non-citizens, are protected by the rights guaranteed under the Convention.[288]

101. In considering the initial periodic report of Sweden in 1993, the Committee was concerned at the practice of taking foreign children into custody under the Aliens Act and noted that this practice is discriminatory insofar as Swedish children generally cannot be placed in custody until after the age of 18.[289] The Committee therefore suggested that consideration be given to providing alternatives to the incarceration of children under the Aliens Act.[290]

102. In 1994 the Committee considered the initial periodic report of Jordan.[291] The Committee expressed concern that, although the National Charter guarantees equality between the sexes in Jordan, discriminatory attitudes and prejudices still occur in the society, and that

there are still disparities in practice, in particular with regard to inheritance rights, the right to leave the country, and the acquisition of Jordanian nationality.[292] In this last respect, the Committee is concerned that in the light of Jordanian legislation, cases of statelessness might arise.[293]

103. With respect to the initial periodic report of Denmark in 1995, the Committee, with regard to the situation of refugee children and children seeking asylum, suggested that the State party consider reviewing its Alien Act as regards its compatibility with the provisions and principles of the Convention, including those contained in its article 10 which stipulates that applications for family reunification should be handled in a positive, humane, and expeditious manner.[294] Similarly, with regard to the provision of health and education services to children in asylum-seeking situations, the Committee drew attention to the provisions of article 2 of the Convention which state, *inter alia*, that "States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction."[295]

104. In considering the initial periodic report of the United Kingdom of Great Britain and Northern Ireland in 1995, the Committee, with regard to article 2 of the Convention relating to non-discrimination, expressed its concern at the insufficient measures undertaken to ensure its implementation. In particular, it was concerned about the possible adverse effects on children of the restrictions applied to unmarried fathers in transmitting citizenship to their children, in contradiction of the provisions of articles 7 and 8 of the Convention.[296]

105. The Committee also considered the periodic report of Italy in 1995.[297] With regard to article 2 of the Convention relating to non-discrimination, the Committee expressed its concern that sufficient measures have not been taken to assess and provide for the needs of children from vulnerable and disadvantaged groups, such as children from poor families and from single-parent households, children of foreign and Roma origin, and children born out of wedlock.[298] The Committee was concerned that children belonging to these disadvantaged groups seem more likely to be stigmatized in public perception, to drop out of school, to be employed in clandestine work or even in illegal activities, including organized criminal activities.[299] The Committee also noted that further measures should also be taken to prevent a rise in discriminatory attitudes and prejudices towards particularly vulnerable children such as children living in poverty, children from the southern region, Roma children, and foreign children.[300] The Government should consider adopting a more active stand and coherent policy with respect to the treatment of these children and to create an environment favourable to their fullest possible integration into Italian society.[301] Comprehensive measures should be provided for responsible parenthood and for support to needy families, in order to assist them in their child-rearing responsibilities in the light of articles 18 and 27 of the Convention, thus limiting family disruption, reducing the numbers of institutionalized children, and limiting the recourse to institutionalization to a measure of last resort.[302]

106. The Committee considered the periodic report of Lebanon in 1996[303] and expressed concern with the apparent discrimination in the granting of nationality to a child of parents of mixed nationality; nationality may only be obtained by a child from her/his Lebanese father but not from the mother and, in the case of unmarried parents, only if the Lebanese father acknowledges the child.[304]

107. The Committee considered the periodic report of the Libyan Arab Jamahiriya in 1998.[305] The Committee was especially concerned about discrimination against migrant and other non-citizen children.[306] The Committee therefore recommended that the Libyan Arab Jamahiriya take all necessary measures to ensure that all children within its jurisdiction enjoy the rights protected by the Convention.

108. The Committee also considered the initial periodic report of Kuwait in 1998.[307] The Committee expressed concern at the existence of laws that discriminated against non-Kuwaiti children, and in particular girls, especially with regard to education and inheritance.[308] The Committee noted that the Convention requires State parties to ensure the implementation of all rights under the Convention to each child within its jurisdiction.[309] The Committee therefore recommended that Kuwait take all appropriate measures to safeguard the rights of all children, including Bedoon children, migrant children, and other non-Kuwaiti citizens particularly with regard to education, health, and other social services.[310]

109. The Committee on the Rights of the Child considered the report of Austria[311] at its twentieth session in 1999. The Committee was concerned about inconsistencies between domestic legislation and the principles and provisions of the Convention, especially with regard to the right to family reunification and some rights of immigrant, asylum-seeking, and refugee children.[312] The Committee was seriously concerned regarding legislation permitting the detention of asylum-seeking children pending deportation.[313] The Committee urged Austria to reconsider the practice of detaining asylum-seeking children, and that such children be treated in accordance with the best interests of the child.[314] The Committee noted continuing concern regarding social and other discrimination faced by children belonging to the Roma community and other minorities, "in particular by those belonging to groups that do not enjoy the constitutional status of 'ethnic groups'."[315] The Committee recommended that Austria "take all appropriate measures to protect and ensure the rights of Roma, Sinti, and other minority children, including protection from all types of discrimination, in accordance with articles 2 and 30 of the Convention."[316]

110. At the same session, the Committee on the Rights of the Child considered the report of Belize.[317] While the Committee noted that the principle of non-discrimination in article 2 is reflected in the Constitution and other domestic legislation, it was concerned that insufficient measures have been adopted to ensure that all children are guaranteed access to education and health services and are protected against all forms of exploitation.[318] In this regard, the Committee was particularly concerned about certain vulnerable groups of children, including refugee and asylum-seeking children, and illegal immigrant children.[319] The Committee recommended that Belize increase its efforts to ensure implementation of the principle of non-discrimination and full compliance with article 2 of the Convention, particularly as it relates to those vulnerable groups.[320] The Committee also noted that child labour and economic exploitation are matters of concern, "particularly the situation of immigrant children working in the banana industry."[321] It recommended that Belize adopt measures to regularize the situation of immigrant children and provide them with documentation to guarantee their rights and facilitate their access to basic health, education, and other services.[322]

111. The Committee on the Rights of the Child also considered the report of Guinea[323] in 1999. The Committee was concerned that Guinea has not adequately implemented article 2 as

insufficient measures have been adopted to ensure that all children fully enjoy the rights recognized in the Convention.[324] The Committee welcomed Guinea's willingness to host refugees from bordering African States, but expressed concern at the limited capacity of the State party to protect and guarantee the rights of unaccompanied and refugee children.[325] The Committee noted "[t]he absence of a legal and administrative framework to protect their rights; the fact that most refugee births are not registered; the lack of alternative care measures for unaccompanied refugee children; and the arbitrary detention of refugee children are matters of concern."[326] The Committee also expressed concern at the increasing phenomenon of trafficking and sale of children into neighbouring countries for work or prostitution.[327] The Committee recommended that Guinea review its legal framework, strengthen law enforcement, and consider cooperation with neighbouring countries to prevent cross-border trafficking.[328]

112. At the same session, the Committee on the Rights of the Child considered the report of Sweden.[329] The Committee welcomed the decision of Sweden to "review legislation setting a lower age for marriage for children resident in or nationals of other States."[330] The Committee recommended that Sweden "consider changes in legislation with a view to increasing protection against the harmful effects of early marriage and to eliminating discrimination among children within its jurisdiction."[331] With regard to article 2 of the Convention, the Committee noted with concern that the principle of non-discrimination is not fully implemented for the children of illegal immigrants.[332] The Committee recommended that Sweden expand the services available to illegal-immigrant children beyond the provision of emergency health services.[333] It also expressed concern about reports of increased racism and xenophobia and urged Sweden to take all appropriate measures to ensure that the child is protected against all forms of discrimination.[334] The Committee expressed concern about existing legislation regarding stateless children and its compliance with the right to acquire a nationality.[335] It encouraged Sweden to complete its revision of the Citizenship Act and urged that "resulting amendments fully take into account article 7 of the Convention."[336]

113. The Committee on the Rights of the Child considered the report of Yemen[337] in 1999 as well. With regard to implementation of article 2 of the Convention, the Committee expressed concern about the occurrence of discrimination affecting disadvantaged groups of children including refugee children, *Akhdam* children, and children belonging to nomadic groups.[338] The Committee welcomed Yemen's openness to hosting refugees from the Horn of Africa; however, it was concerned at the limited capacity of the State party to protect and guarantee the rights of unaccompanied and refugee children.[339] The Committee recommended that Yemen "ensure adequate legal protection to refugee children, including the guarantee of their physical safety and access to health and education."[340]

114. With respect to the initial report of the Central African Republic[341] considered in 2000, the Committee expressed concern at violations of the right to a nationality for children whose birth has not been registered or for children born in the State party and whose parents are not nationals of the State party.[342] The Committee noted that while children can gain nationality from age 12, parents who are non-nationals have much greater difficulty in claiming nationality.[343] The Committee recommended that the Central African Republic examine concerns in the access of children to a nationality and make every effort to improve respect for this right, and recommended further that attention be given to the situation of children whose parents are unable to claim the State party's nationality.[344]

115. Also in 2000, the Committee considered the initial report of the United Kingdom of Great Britain and Northern Ireland – Overseas Territories.[345] The Committee was concerned that, while the new nationality policy of the United Kingdom provides full citizenship to nationals of the Overseas Territories, students from these Territories who wish to pursue further studies in the United Kingdom continue to pay more in tuition fees than those students from the United Kingdom.[346]

116. The Committee considered the initial periodic report of Cambodia[347] in 2000 as well. In doing so, the Committee recommended that Cambodia review its domestic legislation in accordance with the principles and provisions of the Convention, with a view to making birth registration compulsory for all children, without any type of discrimination, and that children of non-Khmer citizens, regardless of their legal status, or refugees, when born in Cambodia, should always be registered at birth even if they are not entitled to Cambodian nationality.[348]

117. In considering the second periodic report of Norway[349] in 2000, the Committee expressed concern that when decisions to deport foreigners convicted of a criminal offence are taken, professional opinions on the impact of such decisions upon the children of the deported persons are not systematically consulted and taken into consideration.[350]

118. In considering the second periodic report of Jordan[351] in 2000 the Committee remained concerned that restrictions on the right of a Jordanian woman to pass on her nationality to her child, particularly where she is married to a refugee, may result in the child becoming stateless.[352]

VII. EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

ECHR jurisprudence

119. The European Court of Human Rights has considered the rights of non-citizens under article 8 of the Convention. Article 8 states that "(1) [e]veryone has the right to respect for his private and family life . . . [and] (2) [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security ... ."

120. The seminal judgement regarding article 8 occurred on 21 June 1988 in the case of *Berrehab v. the Netherlands*.[353] In *Berrehab*, the court defined for the first time the effect of article 8 on the deportation of non-citizens. The substance of the decision was that where the non-citizen has real family ties in the territory of the State from which he is ordered deported, and the deportation measure is such as to jeopardize the maintenance of those ties, the deportation is justified with regard to article 8 only if it is proportionate to the legitimate aim pursued. In other words, the deportation is justified only if the interference with family life is not excessive with respect to the public interest to be protected. The public interest often balanced against the right to respect for family life is the State's interest in maintaining public order and arises in the context of non-citizens convicted of criminal offences.

121. *Berrehab v. the Netherlands*, however, did not involve a criminal conviction. Mr. Berrehab, a citizen of Morocco, was married to a Dutch citizen and received residency status

on that basis. Mr. Berrehab and his spouse later divorced in 1979. Mr. Berrehab, however, had one daughter by the marriage and after the divorce was appointed as his daughter's auxiliary guardian and granted frequent and regular visitation with his daughter.

122. In 1983 Mr. Berrehab's residency permit was not renewed on account of the divorce and he was subsequently arrested and ordered deported. The court, applying the balancing test presented above, found that the deportation order violated article 8 of the Convention.

123. In 1991 the European Court of Human Rights considered *Beldjoudi v. France*[354] in which both the person sought to be deported and his spouse, who possessed French citizenship, challenged the deportation on the grounds that it would violate article 8. Mr. Beldjoudi was born in France, but he was considered an Algerian citizen. In the late 1960s and 1970s he was convicted of a number of offences including assault and battery, theft, aggravated theft, driving a vehicle without a licence, and possession of weapons. These convictions led to a deportation order being issued in 1979. The court considered a number of factors favourable to Mr. Beldjoudi, including that he was born in France and had had French nationality until 1 January 1963. He was deemed to have lost that nationality when he was still a juvenile and only because his parents neglected to reaffirm their French nationality pursuant to the Evian Agreements of 19 March 1962. The Evian Agreements of 19 March 1962 provided that persons born in Algeria while it was a French department, and thereby acquiring French citizenship, were deemed to have relinquished that citizenship if they did not make a declaration recognizing French nationality before 27 March 1967. Upon reaching adulthood he tried to re-establish his French nationality, he had served in the French military, and was married to a French citizen and his close relatives have resided in France for several decades. Upon consideration of these factors the Court held that the deportation order was not proportionate to the legitimate aim pursued and therefore violated both Mr. Beldjoudi's and his spouse's rights under article 8.

124. In 1996, the European Court of Human Rights considered article 8 in *C. v. Belgium*[355] which also dealt with the rights of non-citizens in the context of deportation. Mr. C, a Moroccan citizen, lived in Belgium from 1955 until his deportation was ordered in 1992 due to convictions for criminal damage, unlawful possession of drugs and conspiracy. Mr. C applied to the European Court of Human Rights to find a violation of article 8. The Court's task was to "determine whether the deportation struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder and crime, on the other."[356] The Court found that Mr. C's expulsion was proper because it was not disproportionate to the legitimate aims pursued.[357] The Court attached great importance to the seriousness of Mr. C's crimes, and noted that:

> "[I]t is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences."[358]

125. Mr. C also claimed to be a victim of discrimination on the grounds of race and nationality in violation of article 14 because "his deportation amounted to less favourable treatment than was accorded to criminals who, as nationals of a member State of the European Union, were protected against such a measure in Belgium."[359] The Court found there was no violation of

article 14 because such preferential treatment was "based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has . . . established its own citizenship."[360]

126. In 1997, the European Court of Human Rights in *Bouchelkia v. France* dealt with similar issues regarding the rights of non-citizens.[361] Mr. Bouchelkia was born in Algeria in 1970, and emigrated to France with his mother at age two. In 1990, Mr. Bouchelkia was ordered deported because of a criminal conviction for rape in 1987. Mr. Bouchelkia applied to the European Court of Human Rights to find a violation of article 8 of the European Convention. The Court found no such violation. The Court concluded that the interference in Mr. Bouchelkia's family life "had aims which were entirely compatible with the Convention, namely 'the prevention of disorder or crime'."[362]

127. The seriousness of the crime, however, has been determinative under the article 8 analysis. For example, in *Moustaquim v. Belgium*[363] the European Court of Human Rights considered the case of a Moroccan national who immigrated to Belgium in 1965 when he was 22 months old. Mr. Moustaquim was convicted of a number of crimes including aggravated theft, robbery and assault. The crimes were committed while Mr. Moustaquim was a juvenile, but were referred to the Criminal Court after the Juvenile Division of the Court of Appeal relinquished jurisdiction after determining that juvenile procedures were not affecting Mr. Moustaquim's behaviour.

128. Mr. Moustaquim was ordered deported to Morocco in 1984 and took his case to the European Court of Human Rights alleging a violation of articles 8 and 14 of the Convention. As for article 14, Mr. Moustaquim alleged discrimination on the ground of nationality vis-à-vis juvenile delinquents of two categories: those who possessed Belgian nationality, since they could not be deported; and those who were citizens of another member State of the European Communities, "as a criminal conviction was not sufficient to render them liable to deportation."[364] The Court held that there was no violation of article 14 because Mr. Moustaquim was not similarly situated to Belgium nationals, who had a right to abode in their country of nationality. Also, he was found not similarly situated to nationals of other member States of the European Community because the latter's preferential treatment "is [an] objective and reasonable justification for [preferential treatment] as Belgium belongs, together with those States, to a special legal order."[365]

129. In the *Moustaquim* case, however, the Court did hold that the deportation violated article 8 of the Convention. The Court concluded that deportation "was disproportionate as the authorities had not achieved a just balance between the applicant's interest in maintaining a family life and the public interest in the prevention of disorder."[366] In doing so, the Court noted that to justify interference with the rights protected by paragraph 1 of article 8, namely the right to maintain a family life, the deportation must be, as stated in paragraph 2 of article 8, "necessary in a democratic society." The court interpreted this phrase as requiring a "pressing social need and, in particular, proportionate to the legitimate aim pursued."[367] The Court noted that the criminal convictions were for offences committed while Mr. Moustaquim was a juvenile, that the latest offence was committed in 1980, and that his family was living in Belgium for a long time and one member of the family had acquired Belgian citizenship.

130. Similarly, in 1996 the European Court of Human Rights considered *Nasri v. France*[368] involving an Algerian national convicted of rape and ordered deported. The Court balanced the seriousness of the crime against the State's interest in protecting the public order. In doing so, the Court noted that Mr. Nasri was found to be emotionally immature, easily influenced into aiding in the crime for which he was ordered deported, and received a relatively light sentence. In addition to weighing the seriousness of the crime against the State's need to protect public order, the Court noted that Mr. Nasri was both deaf and mute, had lived in France since he was five years old, and six of his siblings were French citizens. The court unanimously held that the deportation of Mr. Nasri would constitute a violation of article 8.

131. The following applications to the European Commission on Human Rights were decided on procedural grounds and further demonstrate the types of complaints alleged by non-citizens under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

132. For example, on 9 September 1998, the European Commission on Human Rights considered the admissibility of an application, *Purtonen v. Finland*.[369] The applicant, an Estonian citizen and resident of Finland, complained that she was discriminated against on the basis of her nationality and invoked article 14 of the Convention.[370] The applicant's former husband was awarded custody of their child and the applicant alleged that her nationality was wrongly taken into account in the custody case. The Commission noted that "in the enjoyment of the rights and freedoms guaranteed by the Convention, article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations."[371] The Commission noted that although the domestic court took into consideration the cultural backgrounds of the spouses, it was not a basis for the judgement. In determining the application was inadmissible, the Commission stated that the aim pursued by the domestic courts was a legitimate one, namely the protection of the interests of the child.[372]

133. The Court considered the admissibility of an application, *S.N. v. Netherlands*[373] at its session on 4 May 1999. Among other complaints, the applicant, an Iranian national seeking asylum in the Netherlands, alleged that the "failure of Netherlands law to provide an appeal against the decision of the Regional Court upholding the refusal of recognition of refugee status constitutes discrimination against asylum seekers and is contrary to article 14."[374] In declaring the application inadmissible, the Court stated there was no difference in treatment, thus no discrimination as the applicant's situation did not differ from that of other categories of persons, including Netherlands nationals.[375]

VIII. INTER-AMERICAN COURT OF HUMAN RIGHTS (IACHR)

IACHR jurisprudence

134. In 1983 and 1984 the Inter-American Court of Human Rights, at the request of the Government of the Republic of Costa Rica, considered proposed constitutional amendments to articles 14 and 15 of the Costa Rican Constitution that deal with the requirements for naturalization.[376] The proposed article 14, *inter alia*, changed minimum period of residency requirements but retained preferential treatment for Central Americans, Spaniards, and Ibero-Americans. Furthermore, proposed article 14 allowed "foreign women who, by marriage

to a Costa Rican loses her nationality or who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates her desire to take on our nationality" to become naturalized Costa Rican citizens.

135. The Inter-American Court considered the proposed amended article 14 in light of article 1 (1) (Non-Discrimination Clause), article 17 (4) (Rights of the Family), article 20 (Right to Nationality), and article 24 (Right to Equal Protection) of the American Convention on Human Rights.

136. In doing so, the Court concluded that (1) the proposed amendment *did not* affect the right to nationality guaranteed by article 20; (2) that the provisions stipulating preferential treatment in the acquisition of Costa Rican nationality for Central Americans, Ibero-Americans, and Spaniards *did not* constitute discrimination contrary to the Convention; and (3) that the provision stipulating preferential treatment in cases of naturalization applicable to marriage contained in proposed article 14 (4), which favours only one of the spouses, *did* constitute discrimination incompatible with articles 17 (4) and 24 of the Convention.[377]

Notes

[1] CERD Communication 10/1997 (1999).

[2] UN Doc. CERD/C/54/D/10/1997 (1999).

[3] CERD Communication 8/1996 (1996).

[4] UN Doc. CERD/C/54/D/8/1996 (1999).

[5] UN Doc. CERD/C/249.

[6] UN Doc. A/48/18, para. 496 (1993).

[7] *Ibid.* at para. 481.

[8] UN Doc. CERD/C/221/Add.1.

[9] *Ibid.* at para. 209.

[10] *Ibid.* at para. 218.

[11] *Ibid.* at para. 229.

[12] UN Doc. CERD/C/226/Add.5.

[13] *Ibid.* at para. 362.

[14] *Ibid.*

[15] *Ibid.* at para. 380.

[16] UN Doc. CERD/C/207/Add.1.

[17] UN Doc. A/48/14, para. 91.

[18] *Ibid.*

[19] UN Doc. CERD/226/Add.9.

[20] *Ibid.* at para. 314.

[21] *Ibid.* at para. 327.

[22] UN Docs. CERD/C/263/Add.3 and CERD/C/283.

[23] A/50/18, para. 602.

[24] UN Doc. CERD/C/237/Add.1.

[25] UN Doc. A/50/18, para. 83.

[26] *Ibid.* at para. 101.

[27] UN Doc. CERD/C/279/Add.1.

[28] *Ibid.* at para. 550.

[29] *Ibid.*

[30] *Ibid.* at para. 570.

[31] UN Doc. CERD/C/350/Add.1.

[32] UN Doc. A/54/18, para. 484.

[33] *Ibid.* at para. 491.

[34] *Ibid.* at para. 499.

[35] *Ibid.* at para. 496.

[36] *Ibid.* at para. 497.

[37] UN Doc. CERD/C/337/Add.2.

[38] A/54/18, para. 370.

[39] *Ibid.* at para. 376, 381.

[40] *Ibid.* at para. 373.

[41] *Ibid.* at para. 380.

[42] UN Doc. CERD/C/331/Add.1.

[43] UN Doc. A/54/18, para. 509.

[44] *Ibid.* at para. 514.

[45] UN Doc. CERD/C/334/Add.1.

[46] UN Doc. A/54/18, para. 525.

[47] *Ibid.* at para. 529.

[48] *Ibid.*, at para. 530.

[49] *Ibid.* at para. 533.

[50] *Ibid.* at para. 539.

[51] *Ibid.* at para. 538.

[52] UN Doc. CERD/C/336/Add.1.

[53] UN Doc. A/54/18, para. 261.

[54] *Ibid.* at para. 267.

[55] UN Doc. CERD/C/329/Add.2 (1999).

[56] UN Doc. CERD/C/56/Misc.40/Rev.3, at para. 9 (2000).

[57] *Ibid.*

[58] *Ibid.* at para. 11.

[59] *Ibid.*

[60] UN Doc. CERD/C/362/Add.1 (1999).

[61] UN Doc. CERD/C/56/Misc.30/Rev.3, at para. 7 (2000).

[62] UN Doc. CERD/C/329/Add.1 (1999).

[63] UN Doc. CERD/C/56/Misc.31/Rev.3, at para. 12 (2000).

[64] *Ibid.*

[65] *Ibid.*

[66] UN Doc. CERD/C/337/Add.5 (1999).

[67] UN Doc. CERD/C/56/Misc.20/Rev.4, at para. 9 (2000).

[68] Communication No. R.9/35, UN Doc. Supp. No. 40 (A/36/40) at 134 (1981).

[69] Ibid. at para. 6.1.

[70] Ibid. at para. 7.2.

[71] Ibid. at para. 1.2.

[72] Ibid. at para. 9.2.b.2.i.8.

[73] Ibid. at para. 9.2.b.2.i.3.

[74] Communication No. 155/1983, UN Doc. CCPR/C/OP/2 at 11 (1990).

[75] Ibid. at para. 2.4.

[76] Ibid. at para. 8.2.

[77] Ibid. at para. 19.2.

[78] Ibid.

[79] Communication No. 319/1988, UN Doc. CCPR/C/43/D/319/1988 (1988).

[80] Ibid. at para. 3.

[81] Ibid. at para. 5.2.

[82] Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1991).

[83] Ibid. at para. 14.2.

[84] Ibid at para. 15.6; but see also para. 9 of the Dissenting Opinion of Francisco José Aguilar Urbina (proposing another interpretation of the obligations under article 6 (2) of the Covenant and stating that since it has abolished the death penalty, Canada has to guarantee the right to life for all persons in its jurisdiction, without any limitation).

[85] Communication No. 456/1991, UN Doc. CCPR/C/51/D/456/1991 (1991).

[86] Ibid. at para 3.1.

[87] Ibid. at paras. 2.1, 4.7.

[88] Ibid. at para. 9.2.

[89] Communication No. 586/1994, UN Doc. CCPR/C/57/D/586/1994 (1994).

[90] Ibid. at para. 3.

[91] Ibid. at para. 12.4.

[92] Ibid. at para. 12.6.

[93] Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (1993).

[94] Ibid. at para. 3.9.

[95] Ibid.

[96] Ibid. at para. 4.11.

[97] Ibid. at para. 7.14.

[98] Ibid. at para. 9.6.

[99] Communication No. 706/1996, UN Doc. CCPR/C/61/D/706/1996 (1996).

[100] Ibid. at para. 3.1.

[101] Ibid. at para. 5.6.

[102] Ibid. at para. 8.4.

[103] UN Doc. CCPR/C/68/767/1997 (2000).

[104] Ibid. at para. 11.3.

[105] Ibid.

[106] Communication No. 27/1978, UN Doc. CCPR/C/OP/1 at 12 (1984).

[107] Ibid. at para. 13.

[108] Ibid. at para. 14.

[109] Ibid. at para. 16.

[110] Communication No. R. 13/58, UN Doc. Supp. No. 40 (A/36/40) at 160 (1981).

[111] Ibid. at para. 7.4.

[112] Ibid. at para. 10.1.

[113] Communication No. 121/1982 (2 April 1980), UN Doc. CCPR/C/OP/1 at 32 (1984).

[114] Ibid. at para. 3.1.

[115] Ibid. at para. 6.

[116] Communication No. 173/1984, UN Doc. CCPR/C/OP/1 at 51 (1984).

[117] Ibid. at para. 2.2.

[118] Ibid. at para. 4.

[119] Communication No. 209/1986, UN Doc. CCPR/C/OP/1 at 68 (1984).

[120] Ibid. at para. 3.5.

[121] Ibid. at para. 5.2.

[122] Communication No. 236/1987, UN Doc. Supp. No. 40 (A/43/40) at 258 (1988).

[123] Ibid. at para. 5.5.

[124] Ibid. at para. 6.3.

[125] Communication No. 475/1991, UN Doc. CCPR/C/50/D/475/1991 (1991).

[126] Ibid. at para. 3.2.

[127] Ibid. at para. 6.2.

[128] Communication No. 536/1993, UN Doc. CCPR/C/53/D/536/1993 (1993).

[129] Ibid. at para. 3.4.

[130] Ibid. at para. 6.7.

[131] Communication No. 659/1995, UN Doc. CCPR/C/58/D/659/1995 (1995).

[132] Ibid. at para. 3.2.

[133] Ibid. at para. 4.2.

[134] Communication No. 521/1992, UN Doc. CCPR/C/50/D/521/1992 (1992).

[135] Ibid. at para. 11.6.

[136] Communication No. 735/1997, UN Doc. CCPR/C/61/D/735/1997 (1997).

[137] Ibid. at para. 3.1.

[138] Ibid. at para. 9.2.

[139] UN Doc. CCPR/C/79/Add.42 (1994).

[140] Ibid. at para. 6.

[141] Ibid.

[142] UN Doc. CCPR/C/70/Add. 53 (1995).

[143] UN Doc. CCPR/C/79/Add.59 (1995).

[144] UN Doc. CCPR/C/79/Add.59 (1995).

[145] UN Doc. CCPR/C/79/Add.71 (1996).

[146] UN Doc. CCPR/C/79/Add.62 (1996).

[147] UN Doc. CCPR/C/79/Add.87 (1997).

[148] UN Doc. CCPR/C/79/Add.93 (1998).

[149] UN Doc. CCPR/C/79/Add.102 (1998).

[150] Ibid. at para. 13.

[151] Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[152] *Supra* note 150.

[153] UN Doc. CCPR/C/79/Add.100 (1998).

[154] Ibid. at para. 7.

[155] UN Doc. CCPR/C/123/Add.1.

[156] UN Doc. CCPR/C/79/Add.109, para. 13 (1999).

[157] UN Doc. CCPR/C/81/Add.12.

[158] UN Doc. CCPR/C/79/Add.108, para. 7 (1999).

[159] UN Doc. CCPR/C/DNK/99/4 (1999).

[160] UN Doc. CCPR/C/70/DNK at para. 15 (2000).

[161] Ibid.

[162] Ibid. at para. 16.

[163] Ibid.

[164] UN Doc. CCPR/C/128/Add.1.

[165] UN Doc. CCPR/C/70/GAB at para. 16 (2000).

[166] UN Doc. E/C.12/1993/18 (1993).

[167] UN Doc. E/C.12/1994/16 (1994).

[168] UN Doc. E/C.12/1995/15 (1995).

[169] Ibid. at para. 19.

[170] UN Doc. E/1996/6/Add.7 (1996).

[171] UN Doc. E/C.12/1/Add.6, para. 13 (1996).

[172] Ibid. at para. 14.

[173] UN Doc. E/1994/104/Add.7 (1994).

[174] UN Doc. E/C.12/1/Add.8, para. 12 (1996).

[175] Ibid. at para. 21.

[176] Ibid. at para. 15.

[177] Ibid. at para. 22.

[178] UN Doc. E/1994/104/Add.5 (1994).

[179] UN Doc. E/C.12/1/Add.2, para. 10 (1996).

[180] Ibid. at para. 17.

[181] UN Doc. E/1994/106/Add.9 (1994).

[182] UN Doc. E/C.12/1/Add.17, para. 13 (1997).

[183] Ibid. at para. 17.

[184] Ibid. at para. 29.

[185] UN Doc. E/1990/5/Add.26 (1990).

[186] UN Doc. E/C.12/1/Add.15, para. 16 (1997).

[187] Ibid.

[188] Ibid.

[189] Ibid. at para. 17.

[190] Ibid. at para. 22.

[191] Ibid. at para. 24.

[192] UN Doc. E/C.12/1994/19 (1994).

[193] UN Doc. E/C.12/1/Add.19, para. 7 (1997).

[194] Ibid at para. 12.

[195] Ibid.

[196] UN Doc. E/1990/6/Add.11 (1990).

[197] UN Doc. E/C.12/1/Add.25, para. 33 (1998).

[198] Ibid. at para. 13.

[199] Ibid. at para. 23.

[200] UN Doc. E/1990/5/Add.31 (1990).

[201] UN Doc. E/C.12/1/Add.23, para. 11 (1998).

[202] Ibid.

[203] UN Doc. E/1994/104/Add.13 (1994).

[204] UN Doc. E/C.12/1/Add.26, para. 22 (1998).

[205] UN Doc. E/1990/5/Add.32 (1990).

[206] UN Doc. E/C.12/1/Add.24, para. 6 (1998).

[207] Ibid. at para. 19.

[208] Ibid. at para. 8.

[209] Ibid. at para. 22.

[210] UN Doc. E/1994/104/Add.14 (1994).

[211] UN Doc. E/C.12/1/Add.31, para. 37 (1998).

[212] Ibid. at para. 39.

[213] Ibid. at para. 49.

[214] UN Doc. E/1994/104/Add.12 (1994).

[215] UN Doc. E/C.12/1/Add.28, para. 12 (1998).

[216] UN Doc. E/1994/104/Add.14 (1994).

[217] UN Doc. E/C.12/1/Add.29, para. 18 (1998).

[218] Ibid.

[219] Ibid. at para. 14.

[220] Ibid. at para. 28.

[221] UN Doc. E/1990/5/Add.39 (1990).

[222] UN Doc. E/C.12/1/Add.27, para. 21 (1998).

[223] Ibid. at para. 16.

[224] Ibid. at para. 13.

[225] Ibid. at para. 36.

[226] UN Doc. E/1990/5/Add.33 (1990).

[227] UN Doc. E/C.12/1/Add.30, para. 16 (1998).

[228] Ibid. at para. 6.

[229] Ibid. at para. 33.

[230] UN Doc. E/1990/6/Add.16 (1990).

[231] UN Doc. E/C.12/1/Add.38, para. 6 (1999).

[232] UN Doc. E/1990/5/Add.36 (1990).

[233] UN Doc. E/C.12/1/Add.39, para. 5 (1999).

[234] UN Doc. E/1994/104/Add.16 (1994).

[235] UN Doc. E/C.12/1/Add.37, para. 11 (1999).

[236] Ibid.

[237] Ibid. at para. 12.

[238] Ibid. at para. 29.

[239] UN Doc. E/1994/104/Add.15 (1994).

[240] UN Doc. E/C.12/1/Add.34, para. 10 (1999).

[241] Ibid.

[242] Ibid. at para. 23.

[243] Ibid. at para. 24.

[244] Ibid at, para. 26.

[245] UN Doc. E/1990/6/Add.15 (1990).

[246] UN Doc. E/C.12/1/Add.32, para. 6 (1999).

[247] Ibid. at para. 7.

[248] Ibid.

[249] UN Doc. E/1990/6/Add.15 (1990).

[250] UN Doc. E/C.12/1/Add.35, para. 5 (1999).

[251] Ibid. at para. 10.

[252] Ibid. at para. 11.

[253] Ibid. at para. 27.

[254] UN Doc. E/1994/104/Add.20 (1994).

[255] UN Doc. E/C.12/1/Add.53 at para. 11 (2000).

[256] Ibid.

[257] Ibid. at para. 19.

[258] UN Doc. E/C.12/4/Add.1.

[259] UN Doc. E/C.12/1/Add.52 at para. 28 (2000).

[260] UN Doc. E/1990/6/Add.17 (1990).

[261] UN Doc. E/C.12/1/Add.46 at para. 15 (2000).

[262] Ibid. at para. 29.

[263] Ibid. at para. 30.

[264] UN Doc. CEDAW/C/JPN/12 (1994).

[265] UN Doc. A/50/38 at para. 633 (1995).

[266] Ibid.

[267] UN Doc. CEDAW/C/MOR/1 (1996).

[268] UN Doc. A/52/38/Rev.1 at para. 64 (1997).

[269] UN Docs. CEDAW/C/LUX/1 and 2 (1996).

[270] UN Doc. A/52/38/Rev.1 at para. 211 (1997).

[271] UN Docs. CEDAW/C/DZA/1 and Corr.1 and Add.1 (1998).

[272] UN Doc. A/54/38, para. 83 (1999).

[273] Ibid.

[274] Ibid. at para. 84.

[275] UN Docs. CEDAW/C/ESP/3 and CEDAW/C/ESP/4 (1998).

[276] UN Doc. CEDAW/C/1999/L.2/Add.6, para. 40 (1999).

[277] Ibid.

[278] Ibid. at para. 41.

[279] UN Doc. CEDAW/C/IRQ/2-3.

[280] UN Doc. CEDAW/C/2000/II/Add.4 at para. 22 (2000).

[281] UN Docs. CEDAW/C/JOR/1 and CEDAW/C/JOR/2.

[282] UN Doc. A/55/38 at para. 172 (2000).

[283] UN Doc. CEDAW/C/DEU/2-3 and 4.

[284] UN Doc. A/55/38 at para. 317 (2000).

[285] Ibid.

[286] Ibid. at para. 318.

[287] Ibid.

[288] UN Doc. CRC/C/15/Add.18 at para. 12 (1994).

[289] UN Doc. CRC/C/15/Add.2 at para. 9 (1993).

[290] Ibid. at para. 12.

[291] UN Doc. CRC/C/15/Add.21 (1994).

[292] Ibid. at para. 11.

[293] Ibid.

[294] UN Doc. CRC/C/15/Add.33 at para. 30 (1995).

[295] Ibid.

[296] UN Doc. CRC/C/15/Add.34 at para. 12 (1995).

[297] UN Doc. CRC/C/15/Add.41 (1995).

[298] Ibid. at para. 11.

[299] Ibid.

[300] Ibid. at para. 17.

[301] Ibid.

[302] Ibid.

[303] UN Doc. CRC/C/8/Add.2.

[304] UN Doc. CRC/C/15/Add.54 (1996).

[305] UN Doc. CRC/C/28/Add.6 (1998).

[306] UN Doc. CRC/C/15/Add.84 at para. 11 (1998).

[307] UN Doc. CRC/C/8/Add.35 (1998).

[308] UN Doc. CRC/C/15/Add.96 at para. 17 (1998).

[309] Ibid.

[310] Ibid.

[311] UN Doc. CRC/C/11/Add.14 (1999).

[312] UN Doc. CRC/C/15/Add.98, para. 9 (1999).

[313] Ibid. at para. 27.

[314] Ibid.

[315] Ibid. at para. 30.

[316] Ibid.

[317] UN Doc. CRC/C/3/Add.46 (1999).

[318] UN Doc. CRC/C/15/Add.99, para. 16 (1999).

[319] Ibid.

[320] Ibid. at para. 16.

[321] Ibid. at para. 27.

[322] Ibid. at para. 18.

[323] UN Doc. CRC/C/3/Add.48 (1999).

[324] UN Doc. CRC/C/15/Add.100, para. 17 (1999).

[325] Ibid. at para. 30.

[326] Ibid.

[327] Ibid. at para. 35.

[328] Ibid.

[329] UN Doc. CRC/C/65/Add.3 (1999).

[330] UN Doc. CRC/C/15/Add.101, para. 10 (1999).

[331] Ibid.

[332] Ibid. at para. 11.

[333] Ibid.

[334] Ibid. at para. 12.

[335] Ibid. at para. 13.

[336] Ibid.

[337] UN Doc. CRC/C/70/Add.1 (1999).

[338] UN Doc. CRC/C/15/Add.102, para. 18 (1999).

[339] Ibid. at para. 30.

[340] Ibid.

[341] UN Doc. CRC/C/11/Add.18.

[342] UN Doc. CRC/C/15/Add.138 at para. 38 (2000).

[343] Ibid.

[344] Ibid. at para. 39.

[345] UN Docs. CRC/C/41/Add.7 and 9.

[346] UN Doc. CRC/C/15/Add.135 at para. 43 (2000).

[347] UN Doc. CRC/C/11/Add.16.

[348] UN Doc. CRC/C/15/Add.128 at para. 30 (2000).

[349] UN Doc. CRC/C/70/Add.2.

[350] UN Doc. CRC/C/15/Add.126 at para. 30 (2000).

[351] UN Doc. CRC/C/70/Add.4.

[352] UN Doc. CRC/C/15/Add.125 at para. 29 (b) (2000).

[353] *Berrehab v. the Netherlands*, Series A, No. 138 (Eu. Ct. Hum. Rts. 26 June 1988).

[354] *Beldjoudi v. France*, Series A, No. 234-A (Eu. Ct. Hum. Rts. 26 March 1992).

[355] Case No. 35/1995/541/627.

[356] Ibid. at para. 32.

[357] Ibid. at para. 36.

[358] Ibid. at para. 31.

[359] Ibid. at para. 37.

[360] Ibid. at para. 38.

[361] *Bouchelkia v. France*, Reports 1997-I (Eu. Ct. Hum. Rts. 29 January 1997).

[362] Ibid.

[363] *Moustaquim v. Belgium*, Series A, No. 193 (Eu. Ct. Hum. Rts. 18 February 1991).

[364] Ibid. at para. 48.

[365] Ibid. at para. 49.

[366] Ibid. at para. 41.

[367] Ibid. at para. 43.

[368] *Nasri v. France*, Series A, No. 324 (Eu. Ct. Hum. Rts. May 1996).

[369] Application No. 32700/96 (1996).

[370] Ibid. Complaints sec., para. 2.

[371] Ibid. Law sec., para. 2.

[372] Ibid.

[373] Application No. 38088/97 (1997).

[374] Ibid. at para. 3.

[375] Ibid.

[376] The amendment proposed by the Special Committee of the Legislative Assembly in its Report of 22 June 1983 read:

> Article 14. The following are Costa Ricans by naturalization:
>
> (1) Those who have acquired this status by virtue of previous laws;

(2) Native-born nationals of the other countries of Central America, Spaniards and Ibero-Americans with five years official residence in the country and who fulfill the other requirements of the law;

(3) Central Americans, Spaniards and Ibero-Americans, who are not native-born, and other foreigners who have held official residence for a minimum period of seven years and who fulfil the other requirements of the law;

(4) A foreign woman who, by marriage to a Costa Rican loses her nationality or who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates her desire to take on our nationality; and

(5) Anyone who receives honorary nationality from the Legislative Assembly.

[377] Article 17 (4) of the American Convention on Human Rights reads:

Article 17. Rights of the Family

Paragraph 4. The States parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

While article 24 reads:

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.